164-703

164-703

RECORD, CASE No. 14,939.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., ~~681~~ 9

ZEPH T HILL, PLAINTIFF IN ERROR,

vs.

JOHN CORCORAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED DECEMBER 9, 1891.

RECORD, CASE No. 14,939.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 681.

ZEPH T HILL, PLAINTIFF IN ERROR,

vs.

JOHN CORCORAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 15, 1893.

a THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

The President of the United States to the judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, between Zeph T. Hill, appellant, and John Corcoran, appellee, a manifest error hath happened, to the great damage of the said Zeph T. Hill, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, D. C., together with this writ, so that you have the same at Washington, D. C., on the 12th day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal United States Circuit Court, District of Colorado.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of December, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 115th year.

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Allowed by—
JOSEPH C. HELM,
Chief Justice of the Supreme Court of the State of Colorado.

b [Endorsed:] Gen. No. —. —— court of the United States. Zeph Hill, plaintiff in error, *vs.* John Corcoran, d'f't in error. Writ of error to —— court U. S., district of Colorado. Filed in Supreme court Dec. 19, 1890. James A. Miller, clerk.

Return.

THE UNITED STATES OF AMERICA, *State of Colorado,* } ss:

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same, as indicated by the precipe filed herein.

Witness my hand and the seal of said supreme court, at Denver, in said State, this first day of January, 1891.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER, *Clerk*,
By —— ——, *Deputy Clerk*.

c THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to John Corcoran, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 12th day of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein Zeph T. Hill is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph C. Helm, chief justice of the supreme court of the State of Colorado, this 19th day of December, in the year of our Lord one thousand eight hundred and ninety.

JOSEPH C. HELM,
Chief Justice.

d [Endorsed:] Gen. No. —. —— court of the United States, district of Colorado. Zeph T. Hill, plaintiff in error, *vs.* John Corcoran, defendant in error. Citation. Filed in supreme court Dec. 19, 1890. James A. Miller, clerk.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

On this 19th day of December, A. D. 1890, personally appeared Felix A. Richardson before me, the subscriber, clerk of the supreme court of Colorado, and makes oath that he delivered a true copy of the within citation to John Corcoran personally, at Denver, in said State of Colorado.

F. A. RICHARDSON.

Sworn to and subscribed before me this 19th day of December, A. D. 1890.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER,
Clerk of the Supreme Court, Colorado.

1 UNITED STATES OF AMERICA, }
State of Colorado, } ss:

Pleas before the honorable the supreme court of the State of Colorado at a session thereof held at the city of Denver, in said State, on November 7, A. D. 1890, the same being one of the juridical days of the September, A. D. 1890, term of said court.

Present: Hon. Joseph C. Helm, chief justice.
Hon. Chas. D. Hayt, justice.
Hon. Victor A. Elliott, justice.
F. A. Richardson, Esq., bailiff.
James A. Miller, clerk.

Be it remembered that heretofore and on, to wit, December 8, A. D. 1887, there was filed in the office of the clerk of the supreme court a transcript of the record and proceedings of a certain cause theretofore heard by the superior court of the city of Denver, wherein John Corcoran was plaintiff and Zeph T. Hill was defendant, the parts of which said transcript, as indicated by the precipe filed herein, are in words and figures as follows, to wit:

STATE OF COLORADO, }
Arapahoe County, City of Denver, } ss:

In the Superior Court of the City of Denver, November Term, A. D. 1886.

2 Pleas before the Honorable Merrick A. Rogers, judge of the superior court of the city of Denver, in the county of Arapahoe and State aforesaid, and at a term thereof begun and held at the city hall, in the city of Denver, in said county, on the second Monday (being the 8th day) of November, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

Present: Honorable Merrick A. Rogers, judge.
Milton J. Stair, clerk.
Frederick Cramer, sheriff.

JOHN CORCORAN }
vs.
ZEPH T. HILL. }

Be it remembered that afterwards and on, to wit, the 11th day of December, A. D. 1886, came the above-named plaintiff, by his attorneys, Messrs. Patterson & Thomas & Rising & Hartzell, and filed in the clerk's office of the superior court his complaint against the above-named defendant; which said complaint is in words and figures as follows, to wit:

In the Superior Court of the City of Denver, Arapahoe County, State of Colorado.

JOHN CORCORAN, Plaintiff,
vs.
ZEPH T. HILL, Defendant.

3 The plaintiff complains and alleges:

1. That on the 8th day of December, 1886, at the city of Denver, county of Arapahoe and State of Colorado, the plaintiff was the owner and in possession of and entitled thereto the following goods and chattels of the value of one thousand eighty-one & $\frac{10}{100}$ dollars, to wit, thirty-nine (39) cases of men's arctics, three (3) cases ladies' arctics, twenty-three (23) pairs Burt & Packard men's boots, thirty-one (31) pairs Burt & Packard men's shoes, thirty-five (35) pairs men's B. & P. shoes.

2. That the defendant, on the 8th day of December, 1886, at the city of Denver, county of Arapahoe and State of Colorado, without the plaintiff's consent, wrongfully took said goods and chattels from the possession of the plaintiff.

3. That before the commencement of this action the plaintiff demanded of the defendant possession of said goods and chattels.

4. That said defendant still unlawfully withholds and detains said goods and chattels from the possession of the plaintiff, to his damage in the sum of five hundred dollars.

For a second cause of action the plaintiff complains and alleges:

1. That on the 9th day of December, 1866, at the city of Denver, county of Arapahoe and State of Colorado, the plaintiff was the owner and in possession of the following goods and chattels of the value of two thousand four hundred twenty-nine & $\frac{60}{100}$ dollars, to wit: One hundred (100) pairs rubber boots, ten (10) pairs men's boots, seventy-two (72) pairs youth's shoes, thirty-six (36) pairs men's grain slippers, twenty-four (24) pairs men's button
4 shoes, twenty-four (24) pairs men's laced shoes, twenty-one (21) pairs Bal's G. R. & Co.'s shoes, twelve (12) pairs B. & P. shoes, twenty-four (24) pairs boys' buff button shoes, twelve (12) pairs boys' hand-sewed shoes, one hundred and eleven (111) pairs Burt & Packard hand-sewed shoes, twenty-six (26) pairs Lilly & Brackett shoes, five (5) pairs Lippman & Lesser shoes, twenty-six (26) pairs Heiser's shoes, fifty-three (53) pairs B. & P. shoes, seven (7) pairs L. & B. Waukenphast shoes, six (6) pairs Dongola shoes, nineteen (19) pairs Graft's hand-sewed shoes, ten (10) pairs L. & B. shoes, forty-two (42) pairs B. & P. N. K. shoes, thirty-two (32) pairs Heiser's machine-sewed shoes, sixty-three (63) pairs L. & B. grain shoes.

2. That the defendant, on the 9th day of December, 1886, at the city of Denver, county of Arapahoe and State of Colorado, without the plaintiff's consent and wrongfully, took said goods and chattels from the possession of the plaintiff.

3. That before the commencement of this action the plaintiff demanded of the defendant possession of said goods and chattels.

4. That said defendant still unlawfully withholds and detains

said goods and chattels from the possession of the plaintiff, to his damage in the sum of five hundred dollars.

Wherefore the plaintiff demands judgment against the defendant—

1st. For the recovery of the possession of said goods and chattels described in each said causes of action or for the sum of three thousand five hundred ten & $\frac{7}{100}$ dollars, the value thereof, in case a delivery cannot be had.

2nd. For one thousand dollars damages and for costs of
5 suit.

PATTERSON & THOMAS AND
RISING & HARTZELL,
Att'ys for Plaintiff.

STATE OF COLORADO, } ss:
Arapahoe County, }

John Corcoran, being first duly sworn, on oath says that he is the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge.

JOHN CORCORAN.

Subscribed and sworn to before me this 11th day of December, 1886.

H. J. BAILEY,
[SEAL.] *Notary Public.*

The above is endorsed as follows:

Superior court, city of Denver. John Corcoran *vs.* Zeph T. Hill. Complaint. Filed Dec. 11, 1886. M. J. Stair, clerk, by H. H. Minnick, deputy. Patterson & Thomas & Rising & Hartzell, pl'ff's att'ys.

6 And afterwards, to wit, on the 15th day of December, A. D. 1886, came the said plaintiff, by his attorney aforesaid, and filed in the clerk's office of the superior court his summons; which said summons, with the return of the sheriff duly endorsed thereon, is in the words and figures as follows, to wit:

STATE OF COLORADO, } ss:
Arapahoe County, }

In the Superior Court of the City of Denver, said County.

JOHN CORCORAN, Plaintiff, }
vs. } Summons.
ZEPH T. HILL, Defendant. }

The People of the State of Colorado send greeting to the above-named defendant:

You are hereby summoned and required to answer the complaint in the above-entitled action, which has been filed in the office of the clerk of the superior court of the city of Denver, of Arapahoe county, State of Colorado, and to serve a copy of your answer upon the un-

dersigned, at Denver, Colorado, on the second Monday after service hereof if served within said county, or, if served out of said county, but within the second judicial district, then on the third Monday thereafter, or, if served out of said judicial district, but within the State of Colorado, then on the fifth Monday thereafter, exclusive of the day of service.

The general nature of said action is this, to wit: This action is brought to recover the possession of the following-named
7 goods and chattels by you taken from the possession of the plaintiff on or about the 8th day of December, 1886, to wit, 39 cases of men's arctics, 3 cases of ladies' arctics, 28 pairs Burt & Packard men's boots, 31 pairs Burt & Packard men's shoes, 35 pairs men's B. & P. shoes, and to recover the possession of the following-named goods and chattels by you taken from the possession of the plaintiff on or about the 9th day of December, 1886, to wit, 100 pairs rubber boots, 10 pairs men's boots, 72 pairs youths' shoes, 36 pairs men's grain slippers, 24 pairs men's button shoes, 24 pairs men's lace shoes, 21 Bal's G. R. & Co. shoes, 12 pairs B. & P. shoes, 24 pairs boys' buff button shoes, 12 pairs boys' hand-sewed shoes, 111 pairs Burt & Packard hand-made shoes, 26 pairs Lilly & Brackett shoes, 5 pairs Lippman & Lesser shoes, 26 pairs Houser's shoes, 52 pairs B. & P. shoes, 7 pairs L. & B. Waukenphast shoes, 6 pairs Dongola shoes, 19 pairs Graft's hand-sewed shoes, 10 pairs L. & B. shoes, 42 pairs B. & P. N. K. shoes, 32 pairs Heiser's machine-sewed shoes, 68 pairs L. & B. grain shoes.

If you fail to answer the complaint and serve a copy of your answer, as above, within the time aforesaid, judgment will be taken against you according to the prayer of the complaint, which is for recovery of said goods and chattels or for judgment against you for the sum of $3,510.70, the value thereof, in case a delivery cannot be had, and for the sum of one thousand dollars' damages and the costs of suit.

You will take notice that if you fail to answer the complaint, as above, said plaintiff will apply to the court for the relief demanded in this complaint.

Dated December 11th, 1886.

PATTERSON & THOMAS AND
RISING & HARTZELL,
Pl'ff's Att'ys.

Address: Barclay block, Denver, Colo.

8 The above is endorsed as follows:

1664. Superior court. John Corcoran, plaintiff, *vs.* Zeph T. Hill, defendant. Summons. Filed this 15th day of December, A. D. 1886. M. J. Stair, clerk. H. H. Minnick, dep'y clerk.

Sheriff's Fees.

Service	$1 00
Mileage	40
Total	$1 40

STATE OF COLORADO, } ss:
Arapahoe County, }

I do hereby certify that I have duly executed the within summons on this 11th day of December, A. D. 1886, by delivering a true copy of the within summons and a copy of the complaint to the within-named defendant, Zeph T. Hill, personally, at Denver and county aforesaid.

F. CRAMER, *Sheriff,*
By WILLIAM WISE, *Deputy.*

9 And afterwards and on, to wit, the 22nd day of December, A. D. 1886, came the said defendant, by his attorneys, Messrs. Henry W. Hobson, Joseph N. Baxter, and M. B. Carpenter, and filed in the office of the clerk of the superior court his answer to the said complaint; which said answer is in the words and figures as follows, to wit:

STATE OF COLORADO, }
City of Denver. }

In the Superior Court of the City of Denver and State of Colorado.

JOHN CORCORAN, Plaintiff, }
vs.
ZEPH T. HILL, Defendant. }

And now comes the defendant, Zeph T. Hill, in his own proper person and by his attorney, and for answer to the first cause of action in said complaint set out, says

I. That heretofore and at the time of the alleged wrongful taking and detention of the goods and chattels in said first cause of action set out and described this defendant was and from thence hitherto hath been the duly appointed and qualified marshal of the United States for the district of Colorado, and that by virtue of said official position and in pursuance of the duties of the same he seized and took possession of the goods and chattels in said first cause of action mentioned by virtue — and in obedience to the commands of a certain writ of attachment which had theretofore and on, to
10 wit, the 7th day of December, 1886, been issued out of and from the circuit court of the United States of America for the district of Colorado in a certain cause pending in said court, wherein James Cousins, James Cousins, Jr., Thomas Cousins, and Joseph C. Cousins, partners, trading as J. & T. Cousins, were plaintiffs and one Louis Witkowski was defendant, and of which said parties and cause the said circuit court of the United States for the district of Colorado had and hath now full and complete jurisdiction; and, furthermore, that said writ having been issued as aforesaid and having been duly and in accordance with law placed in the hands of this defendant, as marshal of the United States, as aforesaid, for execution thereof, defendant, as marshal as aforesaid and in pursuance of the authority and commands of said writ of attachment so issued and directed to him as aforesaid in the cause pending in said circuit court of the

United States, did seize and take possession of said goods and chattels in the complaint set out and described as the goods and chattels of the said Louis Witkowski, defendant in the cause pending in said circuit court of the United States, as hereinbefore set out, and said defendant did not seize and take passession of said goods and chattels and does not hold and detain the same at the present time or at any other time otherwise than as hereinbefore set out, or except in and by virtue of his official position.

II. And the said defendant for a defence to the second cause of action in said complaint contained says as follows, to wit:

That heretofore and at the time of the alleged wrongful taking and detention of the goods and chattels in said second cause
11 of action set out and described this defendant was and from thence hitherto hath been the duly appointed and qualified marshal of the United States for the district of Colorado, and that by virtue of said official position and in pursuance of the duties of the same he seized and took possession of the goods and chattels in said second cause of action mentioned by virtue — and in obedience to the commands of certain original and alias writs of attachment theretofore and on, to wit, respectively, November 11th and December 8th, 1886, issued out of and from the circuit court of the United States of America for the district of Colorado in a certain cause pending in said court, wherein The Bay State Shoe and Leather Company was plaintiff and one Louis Witkowski was defendant, and of which said parties and cause the said circuit court of the United States for the district of Colorado had and hath now full and complete jurisdiction; and, furthermore, that said writs having been issued as aforesaid and having been duly and in accordance with law placed in the hands of this defendant, as marshal of the United States as aforesaid, for execution thereof, defendant, as marshal as aforesaid and in pursuance of the authority and commands of said writs of attachment so issued and directed to him as aforesaid in the cause pending in said circuit court of the United States, did seize and take possession of said goods and chattels in the complaint set out and described as the goods and chattels of the said Louis Witkowski, defendant in the cause pending in said circuit court of the United States, as hereinbefore set out, and said defendant did not seize and take possession of said goods and does not hold and
12 detain the same at the present time or at any other time otherwise than as hereinbefore set out or except in and by virtue of his official position.

Wherefore this defendant says that this honorable court hath not jurisdiction to issue the writ of replevin in this suit, nor hath it jurisdiction to entertain this suit against this defendant.

And for a further and additional defence to the action aforesaid brought against this defendant he answers and says as follows, to wit:

That at the commencement of the suits hereinafter set out and mentioned one Louis Witkowski was a citizen and resident of the State of Colorado and was indebted in the sum of six hundred and twenty-nine dollars and ninety cents ($629.90) to James Cousins,

James Cousins, Jr., Thomas Cousins, and Joseph C. Cousins, copartners, trading and doing business as J. & T. Cousins, who were citizens and residents of the State of New York at the time aforesaid; that on or about the 7th day of December, A. D. 1886, the said J. & T. Cousins commenced an action in the circuit court of the United States in and for the district of Colorado upon said indebtedness against the said Louis Witkowski and summons was duly issued out of said court, which said summons was thereafter duly executed; and, furthermore, that upon the bringing of said suit and upon the filing of proper bond and affidavit by the plaintiffs therein, it being a case wherein an attachment against the property of the said Louis Witkowski was legal and proper under the statutes of the State of Colorado, a certain writ of attachment was issued
13 out of the aforesaid circuit court of the United States, in due form of law, which said writ of attachment commanded the marshal of the United States for the district of Colorado to attach and safely keep so much of the estate, real and personal, of the said defendant within said district as should be sufficient to satisfy the demands in said writ of attachment set out and described.

And, furthermore, defendant says that on the 11th day of November, 1886, the said Louis Witkowski was indebted to the Bay State Shoe & Leather Company, a corporation organized and existing under the laws of the State of New York and carrying on business therein, in the sum of one thousand eight hundred and eighty-eight dollars and ninety-three cents ($1,888.93), and that on the 11th day of November aforesaid the said The Bay State Shoe & Leather Company commenced an action in the circuit court of the United States for the district of Colorado against the said Louis Witkowski, in which said action summons was duly issued and thereafter duly executed, and proper bond and affidavit having been filed in said case, it being a case wherein a writ of attachment was properly issuable under the laws of the State of Colorado, a certain writ of attachment was then and there issued out of said court, directed to the marshal of the United States for said district and commanding him to attach and safely keep so much of the estate, real and personal, of the said Louis Witkowski within said district as should be necessary to satisfy the demands in said writ of attachment set out and described; and afterwards and on, to wit, December 8th, 1886, a certain alias writ of attachment was issued in said suit of The Bay State Shoe & Leather Company against Louis Witkowski, of the same tenor and purport and to the same effect as the
14 original writ of attachment aforesaid; that said writs of attachment in both of the suits aforesaid were issued upon the grounds, amongst other things, that the said Louis Witkowski had fraudulently conveyed, transferred, and assigned his property and effects so as to hinder and delay his creditors or some one or more of them, and particularly the plaintiffs in said suits, and the same, having been duly issued as aforesaid, came into the hands of the defendant, as marshal of the United States for the district of Colorado, in due course of law, he being then and there the duly appointed and qualified marshal of the United States for said district,

and this defendant, under and by virtue of said writs of attachment and in his official character and not otherwise, and before the return day of said writs, proceeded to levy upon and attach the property set out and described in the plaintiff's complaint in this action as the property and effects of the said Louis Witkowski, and then and there took said property into his custody and keeping under and by virtue of said writs of attachment and not otherwise, and which said property was, at the time of the bringing of this suit, in the custody and under the control of this defendant as marshal of the United States as aforesaid and not otherwise, and which said levy, attachment, taking, and holding constitutes and has constituted the supposed unlawful taking and holding in said complaint set out and complained of.

And defendant further says that said goods and property so taken and attached as aforesaid were at the time of said taking and attachment the property of the said Louis Witkowski and subject to said writs of attachment, and that the plaintiff's pretended title to such goods and property was fraudulently acquired, as here-
15 inafter set out, and that, save and except as hereinafter stated, the said plaintiff, John Corcoran, has and has had no right to or ownership in said property or any part thereof, but the said Louis Witkowski is and was at the time of the levying of the said writs of attachment the actual owner and entitled to the possession of said goods, chattels, and property; that at the time of the issuing of the said writs of attachment, as hereinbefore set out, and prior thereto the said Louis Witkowski was indebted to the plaintiffs in the suits hereinbefore set out and to other creditors in the amount of sixty thousand dollars and upwards, as defendant is informed and charges to be the fact, and although he was the owner and in possession of a large amount of property, goods, and chattels, yet he was in an insolvent condition and unable to meet and pay his legal obligations, of which said fact the plaintiff in this suit was duly aware; that, being informed of the financial standing and condition of the said Louis Witkowski, as aforesaid, the plaintiff, John Corcoran, conspired and combined with the said Louis Witkowski to defeat, delay, hinder, and defraud the creditors of the said Louis Witkowski out of their just claims and demands, and particularly the said J. & T. Cousins and the said Bay State Shoe & Leather Company, and in pursuance of said conspiracy and with intent to defeat, delay, hinder, and defraud the creditors of the said Louis Witkowski, he, the said John Corcoran, assumed to purchase from the said Louis Witkowski and he, the said Louis Witkowski, assumed and pretended to sell, assign, transfer, and deliver to the said John Corcoran all of the goods, property, and chattels of the said Louis Witkowski which were then and there in the store and place of business of the
16 said Louis Witkowski in the city of Denver and had formed and constituted theretofore his stock in trade, and which said stock in trade and goods, chattels, and property pretended to be sold, assigned, transferred, and delivered, as aforesaid, amounted in value, as defendant is informed and charges the fact to be, to the sum of seventy-five thousand dollars; that, as a pretended consid-

eration for said sale and transfer, the said John Corcoran paid to the said Louis Witkowski a small sum of money in cash and gave him his promissory notes for an amount to said defendant unknown, but which said cash and promissory notes upon their face did not amount, as defendant is informed and charges the fact to be, to one-half of the value of the goods, chattels, and property transferred and assigned as aforesaid, nor to one-half of the liabilities of the said Louis Witkowski, as hereinbefore set out.

And defendant furthermore charges that the entire consideration for said sale and transfer was fictitious and fraudulent and was simply intended as a form, to mislead and deceive the creditors of the said Louis Witkowski and to enable the said Louis Witkowski to defeat, delay, hinder, and defraud said creditors of their just claims and demands, as hereinbefore set out, and that at the time of the issuing and levying of the writs of attachment hereinbefore set out the said Louis Witkowski was, as between himself and the said J. & T. Cousins and the said Bay State Shoe & Leather Company and this defendant, as marshal of the United States, as aforesaid, the true and actual owner of all of the property, goods, and chattels set out and described in the complaint in this action, and the plaintiff, John Corcoran, as against the said J. & T. Cousins and the said Bay State Shoe & Leather Company and this defendant, was not and has never been in anywise the actual owner of said property, nor was
17 he entitled to the possession thereof.

And for a further and additional answer and defence to this action defendant says as follows, to wit:

He denies that on or about the 8th day of December, A. D. 1886, at the city of Denver, State of Colorado, or at any other time or place, the plaintiff, John Corcoran, was the owner and entitled to the goods and chattels set out in the first cause of action in said complaint, or of any part thereof.

He denies that on or about the 8th day of December, 1886, at the city of Denver, or at any other time or place, the defendant, without the plaintiff's consent, wrongfully took the goods and chattels in said first cause of action set out and described, or any part thereof, from the possession of the plaintiff.

He denies that he unlawfully or wrongfully withholds and detains the goods and chattels set out and described in said first cause of action, or any part thereof, from the possession of said plaintiff, to his damage in the sum of five hundred dollars or any other amount.

Defendant furthermore denies that on or about the 9th day of December, 1886, at the city of Denver and State of Colorado, or at any other time or place, the plaintiff was the owner and in possession of the goods and chattels set out and described in said second cause of action or any part thereof.

He denies that on the 9th day of December, 1886, at the city of Denver, or at any other time or place, he wrongfully took from the plaintiff's possession the goods and chattels set out and described in said second cause of action or any part thereof.

18 He denies that he unlawfully withholds and detains the goods and chattels in said second cause of action set out and

described, or any part thereof, from the possession of said plaintiff, to his damage in the sum of five hundred dollars or otherwise.

And defendant, having fully answered said complaint and every part thereof, prays that judgment may be entered in his behalf, and that this court refuse to take further cognizance or jurisdiction of this cause of action, and that the same be dismissed, and that judgment may be entered to the effect that the defendant herein is legally entitled to the possession of the goods and chattels set out and described in this complaint, and ordering the same to be returned to his keeping and possession, and that defendant be hence dismissed with his costs in this behalf laid out and expended.

HENRY W. HOBSON,
JOSEPH N. BAXTER,
M. B. CARPENTER,
Att'ys for Defendant.

UNITED STATES OF AMERICA, }
District of Colorado, County of Arapahoe, } *ss:*

Zeph T. Hill, being duly sworn, on oath deposes and says:

First. That he is the defendant in the above-entitled action.

Second. That he has read the foregoing answer and knows the contents thereof, and the facts stated therein are true of his own knowledge except to those matters stated upon information and belief, and as to those matters he believes them to be true.

ZEPH T. HILL.

Subscribed and sworn to before me this 22nd day of December, A. D. 1886.

EDWARD F. BISHOP,
Clerk District Court U. S.,
[SEAL.] By F. W. TUPPER, *Deputy Clerk.*

19 Received a copy of above answer this 22nd day of December, 1886.

PATTERSON & THOMAS,
RISING & HARTZELL,
Pl'ff's Att'ys.

The above is endorsed as follows:

No. —. Superior court of the city of Denver. John Corcoran *vs.* Zeph T. Hill. Answer. Filed December 22nd, 1886. M. J. Stair, clerk.

20 And afterwards, on, to wit, the 28th day of December, A. D. 1886, came the said plaintiff, by his said attorneys, and filed in the office of the clerk of the said superior court his reply; which said reply is in the words and figures as follows, to wit:

In the Superior Court of the City of Denver and State of Colorado.

JOHN CORCORAN, Plaintiff,
vs.
ZEPH T. HILL, Defendant.

Now comes John Corcoran, the above-named plaintiff, and, for reply to the answer of the defendant herein to the first and second causes of action, says:

He admits that at the time of the taking and detention of the goods and chattels described in said first and second causes of action set out in the complaint therein said defendant was the marshal of United States for the district of Colorado, and as such marshal seized and took said goods and chattels as the property of Louis Witkowski, under two certain attachments issued out of the circuit court of the United States for the district of Colorado, as alleged in defendant's said answers; that before the commencement of this action and on, to wit, the 11th day of December, 1886, an order was made and entered of record in the United States circuit court in and for the district of Colorado in each of the causes in which said attachments were issued and under which said goods and chattels were seized and taken by the defendant as such marshal, and
21 which said orders are in the words and figures following, to wit:

"JAMES COUSINS, JAMES COUSINS, JR., Thomas Cousins, and Joseph C. Cousins, Copartners as J. & T. Cousins,
vs.
LOUIS WITKOWSKI.
Action on an Account. Attachment.

At this day comes John Corcoran, petitioner, by Charles Hartzell, Esq., his attorney, and the petition of said Corcoran for leave to bring suit against the marshal of this said district coming on now to be heard, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said petition be granted.

Wherefore it is ordered by the court that the said petitioner have leave to institute his suit upon claim and delivery of personal property against Zeph T. Hill, marshal of the United States for the district of Colorado, to replevin the goods and chattels in said petition described in any court of competent jurisdiction as he shall be advised."

"BAY STATE SHOE & LEATHER COMPANY
vs.
LOUIS WITKOWSKI.
Action on an Account. Attachment.

At this day comes John Corcoran, petitioner, by Charles Hartzell, Esq., his attorney, and the petition of the said Corcoran for leave to bring suit against the marshal of this said district coming on now to be heard, and the court being now sufficiently advised in the

described, or any part thereof, from the possession of said plaintiff, to his damage in the sum of five hundred dollars or otherwise.

And defendant, having fully answered said complaint and every part thereof, prays that judgment may be entered in his behalf, and that this court refuse to take further cognizance or jurisdiction of this cause of action, and that the same be dismissed, and that judgment may be entered to the effect that the defendant herein is legally entitled to the possession of the goods and chattels set out and described in this complaint, and ordering the same to be returned to his keeping and possession, and that defendant be hence dismissed with his costs in this behalf laid out and expended.

HENRY W. HOBSON,
JOSEPH N. BAXTER,
M. B. CARPENTER,
Att'ys for Defendant.

UNITED STATES OF AMERICA, }
District of Colorado, County of Arapahoe, } *ss:*

Zeph T. Hill, being duly sworn, on oath deposes and says:

First. That he is the defendant in the above-entitled action.

Second. That he has read the foregoing answer and knows the contents thereof, and the facts stated therein are true of his own knowledge except to those matters stated upon information and belief, and as to those matters he believes them to be true.

ZEPH T. HILL.

Subscribed and sworn to before me this 22nd day of December, A. D. 1886.

EDWARD F. BISHOP,
Clerk District Court U. S.,
[SEAL.] By F. W. TUPPER, *Deputy Clerk.*

19 Received a copy of above answer this 22nd day of December, 1886.

PATTERSON & THOMAS,
RISING & HARTZELL,
Pl'ff's Att'ys.

The above is endorsed as follows:

No. —. Superior court of the city of Denver. John Corcoran *vs.* Zeph T. Hill. Answer. Filed December 22nd, 1886. M. J. Stair, clerk.

20 And afterwards, on, to wit, the 28th day of December, A. D. 1886, came the said plaintiff, by his said attorneys, and filed in the office of the clerk of the said superior court his reply; which said reply is in the words and figures as follows, to wit:

In the Superior Court of the City of Denver and State of Colorado.

JOHN CORCORAN, Plaintiff,
vs.
ZEPH T. HILL, Defendant.

Now comes John Corcoran, the above-named plaintiff, and, for reply to the answer of the defendant herein to the first and second causes of action, says:

He admits that at the time of the taking and detention of the goods and chattels described in said first and second causes of action set out in the complaint therein said defendant was the marshal of United States for the district of Colorado, and as such marshal seized and took said goods and chattels as the property of Louis Witkowski, under two certain attachments issued out of the circuit court of the United States for the district of Colorado, as alleged in defendant's said answers; that before the commencement of this action and on, to wit, the 11th day of December, 1886, an order was made and entered of record in the United States circuit court in and for the district of Colorado in each of the causes in which said attachments were issued and under which said goods and chattels were seized and taken by the defendant as such marshal, and
21 which said orders are in the words and figures following, to wit:

"JAMES COUSINS, JAMES COUSINS, JR., Thomas Cousins, and Joseph C. Cousins, Copartners as J. & T. Cousins,
vs.
LOUIS WITKOWSKI.
Action on an Account. Attachment.

At this day comes John Corcoran, petitioner, by Charles Hartzell, Esq., his attorney, and the petition of said Corcoran for leave to bring suit against the marshal of this said district coming on now to be heard, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said petition be granted.

Wherefore it is ordered by the court that the said petitioner have leave to institute his suit upon claim and delivery of personal property against Zeph T. Hill, marshal of the United States for the district of Colorado, to replevin the goods and chattels in said petition described in any court of competent jurisdiction as he shall be advised."

"BAY STATE SHOE & LEATHER COMPANY
vs.
LOUIS WITKOWSKI.
Action on an Account. Attachment.

At this day comes John Corcoran, petitioner, by Charles Hartzell, Esq., his attorney, and the petition of the said Corcoran for leave to bring suit against the marshal of this said district coming on now to be heard, and the court being now sufficiently advised in the

premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be granted.

Wherefore it is ordered by the court that the said petitioner have leave to institute his suit upon claim and delivery of personal property against Zeph T. Hill, marshal of the United States for the district of Colorado, to replevin the goods and chattels in said petition described in any court of competent jurisdiction as he shall be advised."

That it was under and by virtue of said orders so made and entered of record in said circuit court of the United States plaintiff obtained full right and authority to bring this suit against the defendant herein, and he says that this honorable court had and has full and complete jurisdiction of the subject-matter of this action and of the person of the defendant herein.

22 And for replication to what is denominated defendant's further and additional defence to plaintiff's action plaintiff says:

That as to whether or not the said Louis Witkowski was indebted to the firm of J. & T. Cousins in the sum of six hundred and twenty-nine dollars and ninety cents at the time of the commencement of an action in the circuit court of the United States by said J. & T. Cousins against said Louis Witkowski upon said alleged indebtedness, as in said answer alleged, or as to whether or not said Louis Witkowski was indebted to the Bay State Shoe & Leather Company in the sum of one thousand eight hundred and eighty-eight dollars and ninety-three cents at the time of the commencement of an action in the circuit court of the United States by the said Bay State Shoe & Leather Company against said Louis Witkowski upon said alleged indebtedness, as in said answer alleged, this plaintiff does not know and has not and cannot obtain sufficient knowledge upon which to base a belief, and therefore he denies each of said allegations.

That as to whether or not at the time of the issuing of the writs of attachment, as set out in said answer, said Louis Witkowski was indebted to plaintiffs in said suits, or to other creditors, in the sum of sixty thousand dollars or in any other sum, or whether or not he was in an insolvent condition and unable to meet and pay his legal obligations, this plaintiff does not now know and has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore he denies each and every of said allegations. He denies that plaintiff at any time or in any way or manner conspired or combined with the said Louis Witkowski or with any other person to defeat, or delay, or hinder, or defraud

23 any of the creditors of the said Louis Witkowski in any way or manner, and denies that plaintiff was at any time informed of the alleged indebtedness of said Louis Witkowski, or that said Witkowski was in an insolvent condition or unable to meet and pay his legal obligations; denies that in pursuance of any conspiracy, or with an intent to defeat, or delay, or hinder, or defraud the creditors of said Louis Witkowski, the plaintiff assumed

to purchase from said Louis Witkowski or said Louis Witkowski assumed and pretended to sell, assign, transfer, and deliver to the plaintiff all or any of the goods, property, and chattels of said Louis Witkowski then and there in the store and place of business of said Louis Witkowski, in the city of Denver or in any other place or any other goods; but, on the contrary, plaintiff avers that on or about the 27th day of October, 1886, he purchased of and from the said Louis Witkowski his stock of goods, of which the goods in controversy are a part, in good faith and paid a full and fair price therefor, and without any intent or purpose to hinder, cheat, or delay the creditors of said Witkowski or any of them, and that he took possession thereof at the time of said purchase.

Denies that said goods and chattels so purchased from said Witkowski and delivered to the plaintiff as aforesaid were of the value of seventy-five thousand dollars, and alleges that the real value of said goods did not exceed the sum paid by plaintiff therefor; denies that the entire consideration or any part of the consideration for said sale and transfer was fictitious or fraudulent, or intended as a form, to mislead or deceive the creditors of said Louis Witkowski or to enable said Witkowski to defeat, or delay, or hinder, or defraud his creditors of their claims and demands or any part thereof.

24 Denies that at the time of the issuing and levying of the writs of attachment set out in said answer the said Louis Witkowski was, as between himself and the said J. & T. Cousins and the Bay State Shoe & Leather Company, or either of them, or the defendant herein, as marshal of the United States as aforesaid, or as between said Witkowski and any other person or persons, the true or actual owner of all or any of the property, goods, or chattels set out and described in the complaint in this action, and denies that said Louis Witkowski, at the time of said levy of said writs of attachment as aforesaid, had an interest of any kind in said goods and chattels, and alleges that at said time the plaintiff was the absolute and unqualified owner of said goods and chattels and entitled to the possession of the same.

Wherefore plaintiff prays judgment as in his said complaint he has demanded.

PATTERSON & THOMAS,
RISING & HARTZELL,
Pl'ff's Att'ys.

STATE OF COLORADO, } ss:
Arapahoe County, }

John Corcoran, being first duly sworn, on his oath says that he is the plaintiff in the above-entitled action; that he has read the foregoing reply and knows the contents thereof, and that the same is true except as to the matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

JOHN CORCORAN.

Subscribed and sworn to before me this 28th day of December, A. D. 1886.

[SEAL.] W. H. WALLACE,
Notary Public.

25 Received a copy of the within reply at Denver, Colo., this 28th day of December, A. D. 1886.

HENRY W. HOBSON,
JOSEPH N. BAXTER,
M. B. CARPENTER,
For ZEPH T. HILL.
ZEPH T. HILL.

The above is endorsed as follows:
Superior court, city of Denver. John Corcoran *vs.* Zeph T. Hill. Reply. Filed Dec. 28th, 1886. M. J. Stair, clerk. Patterson & Thomas and Rising & Hartzell, pl'ff's att'ys.

And afterwards and on, to wit, the 31st day of December, A. D. 1886, came the defendant, by his said attorneys, and filed in the office of the superior court his demurrer to the replication; which said demurrer is in the words and figures as follows, to wit:

26 STATE OF COLORADO, }
City of Denver. }

In the Superior Court of the City of Denver and State of Colorado.

JOHN CORCORAN, Plaintiff, }
vs. }
ZEPH T. HILL, Defendant. }

And now comes the said defendant, Zeph T. Hill, by counsel, and demurs to that portion of the reply of the said John Corcoran made and filed to the answer of this defendant in the case aforesaid commencing with the words "he admits," in the second clause of said reply, and extending down to that portion of the reply commencing with the words "and for replication to what is denominated defendant's further and additional defence to plaintiff's action," for the reason that said reply is not good and sufficient in law and does not state facts sufficient in law to meet defendant's answer in this cause, and upon the following grounds;

1. That the orders of the said — court of the United States for the district of Colorado in said reply set out gave leave to the plaintiff, John Corecran, to bring suit against Zeph T. Hill, marshal of the United States for the district of Colorado, in his official capacity and for and concerning the official acts of said marshal, whereas this said suit is brought against the defendant, Zeph T. Hill, in his individual capacity and charges him personally and individually with certain wrongful acts, as set out in the complaint herein.

27 2. Because, as set out in the answer of defendant herein, this court hath not and never had any jurisdiction to issue the

writ of replevin in this suit, nor to entertain jurisdiction hereof, and it was beyond the power and jurisdiction of the circuit court of the United States for the district of Colorado, by any order or other proceedings, to confer jurisdiction upon this court in the matter of this suit.

3. Because said reply does not state facts sufficient to constitute a good reply to defendant's answer.

HENRY W. HOBSON,
Att'y for Defendant.

M. B. CARPENTER,
JOSEPH N. BAXTER,
Of Counsel.

The above is endorsed as follows:

1664. Superior court of the city of Denver. John Corcoran *vs.* Zeph T. Hill. Demurrer to replication. Filed Dec. 31st, 1886. M. J. Stair, clerk, by H. H. Minnick, dep'y. Henry W. Hobson, att'y. for defendant.

28 And afterwards and on, to wit, the 7th day of November, A. D. 1890, the same being one of the juridical days of the September, A. D. 1890, term of said supreme court—present, Honorable Joseph C. Helm, chief justice; Honorable Victor A. Elliott, justice; Honorable Charles D. Hayt, justice; F. A. Richardson, Esq., bailiff; James A. Miller, clerk—the following proceedings were had in said cause, to wit:

ZEPH T. HILL, Appellant, *vs.* JOHN CORCORAN, Appellee. } No. 2158. Appeal from Superior Court of the City of Denver.

At this day this cause coming on to be heard as well upon the transcript of proceedings and judgment had in said superior court in and for the city of Denver as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the

29 court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said superior court, it is therefore considered and adjudged by the court that the judgment aforesaid of said superior court be, and the same is hereby, affirmed and stand in full force and effect, and that this cause be remanded to the district court of Arapahoe county (said district court being the successor under the law to said superior court) for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said superior court in the cause, notwithstanding the said appeal.

It is further considered and adjudged by the court that said appellee do have and recover of and from said appellant his costs in this behalf expended, to be taxed, and that he have execution therefor.

And let the opinion of the court filed herein be recorded.

And on the same day, to wit, November 7, A. D. 1890, said supreme court filed in the office of the clerk of said court its opinion in said cause in words and figures following, to wit:

30 ZEPH T. HILL, Appellant,
vs.
JOHN CORCORAN, Appellee. } No. 2158.

Appeal from the superior court of the city of Denver.

This was an action of replevin brought by the appellee, Corcoran, against Hill to recover the possession of certain property alleged to have been unlawfully taken, with damages for the detention. Hill defended and justified the taking under mesne processes of attachment issued out of the Federal court in Colorado in two cases, in one of which Cousins and others were plaintiffs and Louis Witkowski was defendant, and in the other of which the Bay State Shoe & Leather Company were plaintiffs and Witkowski was likewise defendant. The defendant not only contested the jurisdiction of the court over him in this suit, but further defended on the ground that the sale between Witkowski and Corcoran, under which Corcoran claimed title, was fraudulent as against creditors, and consequently that the transfer was indefensible. Issue was taken by the plaintiff, Corcoran, upon the various matters set up in the answer, and he justified his suit and attempted to sustain the jurisdiction of the court by setting up leave of the Federal court to institute the particular suit by an order duly entered for the purpose. The replication was demurred to, as to so much of it as set up the authority to institute this suit under leave granted,
31 on the theory that the Federal court was without jurisdiction to grant the leave, and that under the order, or by reason of it, or under any circumstances, the State court could acquire no jurisdiction, because the property had been seized by the marshal. The demurrer was overruled and the cause tried upon the main issue as to the character of the sale to Corcoran. No evidence of the value of the goods sold to Corcoran was given save that which came out in the history of the sale to him by Witkowski and the inventory made at the time. Little evidence was given by the defendant which tended to establish the fraudulent character of the sale, nor did the defendant attempt to prove the extent of Witkowski's indebtedness or Corcoran's knowledge of his situation. Whatever was proved upon that subject was of an inferential character and derived almost wholly from the general history of the sale. The jury found upon this issue for the plaintiff. The defendant appeals.

Mr. Joseph N. Baxter and Mr. M. B. Carpenter, attorneys for appellant; Messrs. Patterson & Thomas, attorneys for appellee.

BISSELL, *C.*:

Among the many errors urged on behalf the appellant, that which is most extensively argued is based upon the action of the

court in entertaining jurisdiction of the suit. This question was supposed to have been set at rest by the decisions of this court in the cases of—

Smith *vs.* Bauer, 9 Colo., 380;
Weil *vs.* Smith, 11 Colo., 310;
Mitchell *vs.* Smith, 13 Colo., 170, and
Smith *vs.* Jensen, 13 Colo., 213.

32 In view of the constant and repeated assaults upon the principle involved in these decisions and of the later adjudications of the Supreme Court of the United States, particularly that of Covell *vs.* Heyman, 111 U. S., 176, it has been deemed best to further elucidate and explain this court's position on the question. This is ample justification for the labor and space essential to what may be taken as an end of the controversy until the highest tribunal of the nation shall declare its opinion on the very matter in dispute. The language used by that very distinguished court in the case last referred to, as in all the cases following Freeman *vs.* Howe, in 24 Howard, affords some apparent warrant for the contention of appellant's counsel. When properly understood and explained, however, none of the Federal authorities nor any of the arguments urged against this court's position compel any modification of the doctrine already announced. It is one of the fundamentals of the law that to entertain and decide a controversy between parties it is essential that the court which tries the case shall have jurisdiction of both subject-matter and of parties. The postulate that wherever there is a want of jurisdiction, either as to the person or as to the subject-matter, the judgment which it may render is indefensible is without exception. It has thus become common to assert that wherever a matter can be termed jurisdictional it is beyond the power of the court to increase or diminish its powers at pleasure concerning that matter. With regard to the subject-matter of this replevin suit the action of the Federal court concerning it cannot be said, except in a special and very restricted sense, to be jurisdictional. To permit the *res* to be seized on the process of

33 another court, organized and exercising its judicial functions under a different sovereignty, may, without doing violence to legal terms or juridical definition, be termed an invasion of the jurisdiction of the court which has taken the property. But in the sense and in the broad inclusion of meaning in which that word jurisdiction is by the courts and lawyers used, understood, and defined, the word is not accurately applied and has led to much uncertainty and confusion. In the main action in which the mesne process issued the court has jurisdiction, assuming the action to have been rightly brought, of both parties and subject-matter. If, however, B's property be taken on the writ issued and executed in C's suit against A, the court, as to the essentials of the controversy arising from the seizure, has jurisdiction neither of the person nor of the subject-matter. B is neither privy nor party; if his property be taken and sold, he is neither bound nor concluded by either process, judgment, or sale. He has not lost his property right, nor is

he without remedy. The definite thing may have disappeared and he may be restricted in the remedies open to him to enforce his rights and redress his wrongs; but of him and of the subject-matter of any suit which he may lawfully institute the court which seized his property has no jurisdiction without the concurrence of other facts to bring the matter within the scope of Federal cognizance. This demonstrates the inaccuracy of the application of the word jurisdiction as a designation of the primary and fundamental difficulty. It is only the limited possessory element of jurisdiction which is either concerned or involved. The general trouble has arisen from the insurmountable obstacle to absolutely
34 accurate and perfect judicial declaration. Unless the precise question be raised by the record it is most liable to lie hidden beyond the range of mental vision and be discoverable only as the land is when the ship has sailed far enough in its direction. The exact question herein has never been presented to the Supreme Court of the United States, nor has it ever had occasion to declare its position on this phase of it. The position of this court being unassailable and supported by every consideration of comity, necessity, and convenience, as well as by sound and convincing legal argumentation, founded on well understood and recognized rules of judicial definition and interpretation, it may very properly be assumed to be in harmony with the probable future declarations of that court.

The whole question is one of the avoidance of a conflict in the exercise of the powers of two courts acting under authority conferred by different sovereignties, but exercised within the same general territorial limits. This is plain to be seen when the subject is considered both with reference to the purposes for which the authority is claimed and the absence of right on the part of the parties really interested to assert that the control of the Federal court is exclusive. The object is not to preserve the property or its fruits to answer the judgment, for neither can ultimately be devoted to any such purpose if the process has been laid upon property to which the defendant in the process had no title. This is apparent, because the officer may be sued in a State court in trespass for the unlawful taking, or he and his bondsmen may in like manner be sued upon his official bond and made to respond for the unlawful conversion. This is abundantly settled by the same high
35 court, which declares that property taken under its process may not be interfered with so long as it is within the scope and power of the writ.

Lammon *et al. vs.* Feusier *et al.*, 111 U. S., 17.
Buck *vs.* Colbath, 3 Wall., 334.

The real owner is not precluded from asserting his title as against the marshal in a tribunal of his own selection. It is only that the goods are temporarily and incidentally in the custody of the court and a stranger may not lay hold of them. Under these circumstances it is not easy to see why the Federal court may not by order permit the *res*, the specific thing, to be pursued. The privilege does

not at all belong to the officer, neither is it his right. He could not justify on any grounds personal to himself. The jurisdiction of the Federal court is dependent on citizenship or on some other statutory consideration; if both be lacking, there is no personal right in the officer. When he is permitted to set up the defence he simply asserts the power and authority of the court; it is only because the court's rights and functions are involved that the plea is permitted to him. That it is not a personal privilege is evident from those decisions which permit the damages for the taking to be recovered either of him or his bondsmen. If it were a personal privilege or his right and privilege as an officer, the defence would always be available, and he could at all times and in all courts insist upon his right to litigate in the Federal forum, whether sued in trespass or on his bond or in replevin. That he may insist upon it in replevin is solely because the property is in the custody of the Federal court.

36 The plaintiff in the action in which process issues is equally without right to demand that the replevin suit be heard in the Federal tribunal. He is without any choice in the premises as to the forum in which that controversy shall be settled. The original suit does not enter into the solution of that problem. The jurisdiction of the court over the original subject-matter and controversy is neither assumed nor cast off at its pleasure. It always remains when justly invoked and set into active operation. To say that it may by order release property which has been seized under its process, either to answer a judgment which may or may not be recovered or to satisfy one already rendered, when the particular property is alleged not to be answerable to the judgment, and permit that question to be litigated in a court otherwise of competent jurisdiction, is not to assume a power in the court to refuse or assert a jurisdiction over the subject-matter of a controversy represented by citizens who have a right to be heard in that forum. The officer is without personal right to be heard, for he may elsewhere be made to answer for his illegal taking; the party is without right, because he neither has the property nor can he be heard to plead in any suit against the officer. The plea of levy under the process of the Federal court is, then, neither a personal plea nor one incidental to the office of marshal, but the setting up of a fact, to wit, the antecedent acquisition of possession of the property by another court foreign to the tribunal in which the later action has been instituted. It is the fact of possession solely which, if at all, permits the jurisdiction to be said to attach. It does not

37 spring from the existence of the main suit nor grow out of the person-el of the officer. But the circumstance that the officer of a particular court under its process has seized the goods by construction brings them within the jurisdiction of that tribunal, and the possession, save by the exercise of a wise and well directed comity, may not be disturbed. The ultimate judgment in the action wherein the mesne process was issued and the sale of the property seized under final execution in no manner affects the question of title to the property. The *res*, the specific thing, may be

lost or transferred, but the owner may still recover of the officer for the taking, and neither the seizure and sale nor the judgment of that court is of any moment in determining the matter of the ownership. When, then, it is asserted that the question is one of jurisdiction, it is only true in a limited and special sense. The property is in the hands of the court and consequently is accurately said to have passed within its jurisdiction. The question of title to the property seized is never involved in the principal suit nor at all affected by the fact of seizure. A particular remedy for the establishment of that title is unavailable because it invades the court's possession. All the court surrenders when it enters an order permitting suit to be instituted against its officer is that possession, and the right to it. It neither assumes jurisdiction of the subject-matter of any suit, nor does it reject jurisdiction of any controversy which has been initiated in it. The parties to the original suit remain unaffected by the order, for they never had any right to have the question of title to B's property investigated in the suit which has been brought by A against C. The officer has lost
38 nothing, because he might always be sued in the foreign tribunal for his illegal acts. The court has simply said the possession is so far yielded that the matter of ownership may be litigated in the State court. That the power exists to make the order appears unquestionable. It is conceded that there is no statutory grant of such authority, but it is the incidental and inherent right existing in every court to control, direct, and govern its own process, to maintain its authority over property which has been seized under it or relinquish it at its pleasure, so long as no right to contest the surrender enures to any suitor or citizen. As said by Mr. Justice Miller in Buck *vs.* Colbath, *supra*, "It is only while the property is in the possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

The Supreme Court has undoubtedly declared the law to be that the stranger whose property has been seized may in their court assert and defend his title as against the process. No other position would be consistent either with the rights of citizens or the exercise of a proper authority by the court. The position and rule laid down by the Supreme Court of the United States is not at all in conflict with the principles which this court has declared. Both rules may well be permitted to stand, and the comity and har-
39 mony which has always prevailed and been asserted by both tribunals will be the better conserved and protected. The court did not err in overruling the demurrer to the replication.

The remaining errors assigned require no extended consideration. Two of them may be grouped, since they grow out of the excusing of one of the jurors from service and the remark made by the court incidentally when he was let off from service on the panel.

It is quite true that when the court commits an error in excusing a juror who is challenged for cause that error is the subject of review in this court, and when it is plain to be seen that thereby a party has been prejudiced, the cause will be reversed. This cause, however, does not seem to be brought very clearly within that rule. The record as it is brought up fails to show at what time and under what circumstances the juror, Light, was excused from service, save that it appears that during the progress of the examination counsel for appellee submitted to the court "That it was a question whether the juror under the circumstances ought to be admitted into the panel." No direct challenge was made for cause, nor did the court rule directly upon the proposition of a challenge as made by the challenging party. The judge proceeded to further examine the juror, and upon the conclusion of his questions excused him, and thereto the appellee saved an exception. But for the remark of counsel no objection to the excuse of the juror could have been taken, and such exercise of the court's discretion would not have been available on error.

Moody *vs.* The People, 7 Colo., 218.

Were it necessary the court would be inclined to hold that there was no sustaining of a challenge for cause upon which
40 error could be based. But it is evident that the juror was so circumstanced in his situation and in his relations that the court properly exercised the discretion reposed in it when it excused him from the panel. He was in the employ of a firm apparently on the most excellent terms and intimate relations with one of the parties in interest. The firm became their bondsmen upon the instrument which secured them in the possession of the property in the original controversy. It is apparent that one side of the case at least might easily have been the subject of enlarged discussion in the house wherein the juror was a clerk, and that from the atmosphere he was liable to imbibe notions and prejudices which would render him not, perhaps, an incompetent juror, but one who would not be thoroughly impartial as between the parties. At the time that the juror was excused and the exception was saved a remark was made by the judge which had a tendency to cast some discredit upon the action of counsel in saving the exception. There is a dispute between the attorneys for the respective parties in this court as to the regularity of the bill of exceptions and the accuracy of its contents. The remark which was excepted to was written in the bill apparently after its preparation by the stenographer, and it has since been crossed out by pencil, so as to leave it uncertain whether legitimately it is a part of the record. This court will not assume the task of determining what the fact is and weighing the evidence furnished by counsel *pro* and *con.* upon the subject. If the appellant desired to predicate error upon that proposition it was his duty,
after the bill of exceptions exhibiting the erasure was filed
41 in this court, to suggest a diminution of the record and obtain leave to file a supplemental bill showing the action of the court in the premises. It cannot be expected that this court

will determine matters which are not properly determinable from the record before it. It is, perhaps, proper to say, however, that while the remark is of a slightly unjudicial character, it is not of the sort for which under the showing made here a case would be reversed. It is not every slight departure from the strictest judicial propriety which will warrant the setting aside of the finding of a jury. It must be clear, or reasonably so, at least, that the remark would probably tend to the prejudice of the party against whom it was made. That is not clear under the circumstances here, for there is no showing as to the number of jurors in the box who remained there to render the verdict after the remark was made, nor does the remark itself tend to indicate any predisposition of the court regarding the controversy.

The instructions which were asked by appellant and refused were rightly denied. It is quite within the province of a *nisi prius* tribunal to reject the instructions in the form asked by counsel, and to express the law upon the subjects covered in their own fashion and in their own phraseology. The practice, perhaps, is more honored in the breach than in the observance; but wherever it is done, and the subjects embraced within the instructions asked by counsel are included in the court's own admonitions to the jury, there is no cause for complaint. In this case the instructions which it would have been error to refuse had they not been covered were fully included within the court's statement of the law. As
42 to the others, it may be said that the case lacks the evidence upon which they can be properly predicated. It is true that an inadequacy of price is always a matter for the consideration of the jury in determining the fairness of a sale as between the purchaser and a failing debtor, but to apply it to any given controversy it is incumbent upon the contestant to make proof of the real value and the proper price of the goods that were sold. The only way in which that was done in this case was by comparing the price paid by the purchaser with the original cost of the goods. This is not such a determining of value as necessitates the giving of that instruction.

There is but one other error which need be considered, and this grows out of the overruling of a motion for a new trial based upon an affidavit substantially setting forth that during the trial one of the jurors in the panel was accused of a grave crime, and that he employed one of the counsel for the other side to defend him against the charge. There was nothing in the proof offered upon this matter which tended to show that the juror was thereby rendered incompetent, or that he failed to give due and proper attention to the testimony as it was adduced and to the arguments of counsel. Even under great strain and pressure of misfortune or other circumstances the mental operations may, for collateral purposes, be as clear and precise, and possibly more accurate, than when free from pressure. These facts are not of themselves enough to warrant setting aside a verdict which is abundantly sustained by the testimony.

There are no others errors assigned which need consideration.

43 The judgment should be affirmed.

Richmond and Reed, C. C., concurring.

Per Curiam:

For the reasons stated in the foregoing opinion the judgment of the court below is affirmed.

Mr. Justice ELLIOTT (dissenting):

I cannot concur in the foregoing opinion for the reasons stated in my dissenting opinion in the case of Mitchell *vs.* Smith, 13 Colo., 172.

The above is endorsed as follows:
Filed in supreme court Nov. 7, 1890. James A. Miller, clerk.

44 And on, to wit, December 18th, A. D. 1890, came said appellant and filed his petition for writ of error from the Supreme Court of the United States; which said petition, as also the allowance thereof, endorsed thereon by the chief justice of this supreme court, is as follows, to wit:

To the Honorable Joseph C. Helm, chief justice of the supreme court of the State of Colorado:

And now comes Zeph T. Hill, of the city of Denver, county of Arapahoe, and State of Colorado, by M. B. Carpenter and J. N. Baxter, his attorneys, and complains that in the record and proceedings and also in the rendition of a judgment in a suit between Zeph T. Hill, appellant, and John Corcoran, appellee, in the supreme court of the State of Colorado, being the highest court of law or equity of the said State in which a decision could be had in said suit, and in which a final judgment was rendered against him on the seventh day of November, A. D. 1890, in said suit, wherein the decision draws in question an authority exercised under the United States, the petitioner claiming in his pleadings the protection of a writ issued to him as the marshal of the United States for the district of Colorado, and the decision of the said supreme court of the State of Colorado is against the protection thus claimed, all of which appears in the records and proceedings in said suit, manifest error hath happened, to the great damage of the said Zeph T. Hill.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the
45 Supreme Court of the United States.

M. B. CARPENTER AND
JOS. N. BAXTER,
Attorneys for Appellant.

Allowed December 18th, 1890.
JOSEPH C. HELM,
Chief Justice.

The above is endorsed as follows:
Zeph T. Hill, plaintiff in error, *vs.* John Corcoran, defendant in

error. Petition for writ of error from Supreme Court of United States and allowance thereof. Filed in supreme court Dec. 18, 1890. James A. Miller, clerk.

And on the 19th day of December, A. D. 1890, came again said appellant and filed with the clerk of said supreme court his supersedeas bond; which said bond, with the approval thereof and endorsements thereon, *are* as follows, to wit:

46 THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that we, the undersigned, William H. Armsby, James McNeil, Eugene A. West, & Edgar N. Green, are held and firmly bound unto John Corcoran in the full and just sum of six thousand dollars, to be paid to the said John Corcoran; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of December, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at the September term, A. D. 1890, of the supreme court of the State of Colorado, in a suit pending in said court, between Zeph T. Hill, appellant, John Corcoran, appellee, judgment was rendered against the said Zeph T. Hill; and the said Zeph T. Hill having obtained a writ of error to reverse the judgment of said court and a citation directed to the said John Corcoran, citing and admonishing him to be and appear at the Supreme Court of the United States, to be held at Washington, D. C., on the 12th day of October next:

Now, the condition of the above obligation is such that if the said Zeph T. Hill shall prosecute said writ of error to effect and answer all damages and costs if he fails to make good his plea, then the above obligation to be void; else to remain in full
47 force and virtue.

WILLIAM H. ARMSBY. [SEAL.]
[SEAL.] JAMES McNEIL. [SEAL.]
EUGENE A. WEST. [SEAL.]
EDGAR N. GREEN. [SEAL.]

Approved:
JOSEPH C. HELM,
Chief Justice.

Justification.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

William H. Armsby, James McNeil, sureties on the within bond, being each first duly sworn, the said Armsby affirming, deposes

and saith that he is worth in real and personal property the sum below set opposite his name—that is to say:

As to William H. Armsby, three thousand dollars;
As to James McNeil, three thousand dollars;
As to Eugene A. West, two thousand dollars;
As to Edgar N. Green, two thousand dollars;

over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

WILLIAM H. ARMSBY.
JAMES McNEIL.
EUGENE A. WEST.
EDGAR N. GREEN.

Subscribed and sworn to before me, at Denver, this 19th day of December, A. D. 1890.

W. M. McBIRD,
Notary Public.

The above is endorsed as follows:

Zeph Hill, pl'ff in error, *vs.* John Corcoran, d'f't in error. Filed in supreme court Dec. 19, 1890. James A. Miller, clerk.

48 ZEPH T. HILL, Plaintiff in Error,
vs.
JOHN CORCORAN, Defendant in Error.

Error to supreme court of Colorado.

To James A. Miller, Esq., clerk supreme court of Colorado:

The clerk will make a transcript of the record in the above-entitled cause for the Supreme Court of the United States and incorporate therein—

The complaint,
The summons,
The answer,
The replication,
The demurrer to the replication,
Judgment and opinion of the supreme court,
The petition for writ of error,
Original writ of error,
Supersedeas bond,
Original citation.

Very truly yours,

M. B. CARPENTER,
JOS. N. BAXTER,
Att'ys for Pl'ff in Error.

Denver, Colo., Dec. 19, 1890.

49 The above is endorsed as follows:

Zeph Hill, pl'ff in error, *vs.* John Corcoran, def't in error. Precipe for transcript for Supreme Court of United States. Filed in supreme court Dec. 19, 1890. James A. Miller, clerk.

STATE OF COLORADO *ss:*

I, James A. Miller, clerk of the supreme court of the State of Colorado, do hereby certify the foregoing to be true and complete transcripts of (1) the complaint, (2) summons, (3) answer, (4) replication, (5) demurrer to replication, (6) judgment of supreme court of Colorado, (7) opinion of the supreme court of Colorado, (8) petition for writ of error from Supreme Court of United States, with the allowance thereof, (9) supersedeas bond, (10) precipe for the record, (11) original writ of error, and (12) original citation and affidavit of service, in a certain cause lately pending in said supreme court upon appeal from the judgment of the superior court of the city of Denver, wherein Zeph T. Hill was appellant and John Corcoran was appellee, as fully as the same appear from the records and files of said cause in my office now remaining.

50 Witness my hand and the seal of said supreme court, affixed at my office this first day of January, A. D. 1891.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER,
Clerk Supreme Court State of Colorado.

Paid by pl'ff in error:

For this transcript, 150 folios, 20c.	$30 00
Certificate	1 00
	$31 00
For service of citation, p'd by pl'ff in error	95
Total	$31 95

Endorsed on cover: Case No. 14,939. Colorado supreme court. Term No., 681. Zeph T. Hill, plaintiff in error, *vs.* John Corcoran. Filed December 9th, 1891.

164-703

164-703

United States Supreme Court.

ZEPH T. HILL,
Plaintiff in Error,

vs.

JOHN CORCORAN,
Defendant in Error.

9

To the Honorable the Supreme Court of the United States:

The petition of Zeph. T. Hill, the plaintiff in error, respectfully shows to this Court that your petitioner was at all the times hereinafter mentioned the United States Marshall for the District of Colorado.

That heretofore and in or about the month of December, 1886, The Bay State Shoe & Leather Co. of Massachusets and the firm of J. & T. Cousins of the City of New York, sued out simultaneous writs of attachments in the United States Circuit Court of the District of Colorado against one Louis Witkowski, to recover certain goods that had been fraudulently obtained by the said Witkowski from the plaintiff, which said writ, were directed and delivered to

your petitioner as Marshal for said District of Colorado.

That thereupon your petitioner, as such Marshal as aforesaid, and under said writ, attached the goods called for by the said attachments, and took the same into his custody; and that thereupon one John Corcoran the defendant in error herein claiming to be the owner of said goods, but declining to intervene as a party in said attachment suit, applied to the said United States Circuit Court, *ex parte*, and obtained an order, permitting him to sue your petitioner as such Marshal as aforesaid in an action of replevin, to recover the possession of said goods in any Court of competent jurisdiction. That no notice of any such application was ever served upon your petitioner nor any copy of said order, nor was any notice or order served upon the plaintiffs in said attachment suits.

That thereupon the said Corcoran brought suit in replevin in the Superior Court of the City of Denver, Colorado, against your petitioner as said Marshal, to recover the said goods so held under said attachments.

That the said Corcoran recovered judgment against your petitioner for the value of the goods so attached by him, which was afterwards affirmed by the Supreme Court of Colorado, and that thereafter your petitioner sued out a writ of error to this Honorable Court.

That your petitioner required the said Bay State Shoe & Leather Co. and the said J. & T. Cousins to indemnify him against all loss by reason of the claim made against him by the said John Corcoran.

That in the meantime judgments were duly recovered in the said United States Circuit Court, in favor of the said Bay State Shoe & Leather Co.,

and the J. & T. Cousins, the plaintiffs in the attachment suits, for the full amount sued for and against the said Louis Witkowski, and that thereafter and pursuant to the said judgment the goods so attached were by your petitioner, as such Marshal as aforesaid, duly sold.

That thereafter the appeal on the said writ of error, came on for hearing and argument before this Honorable Court at the October Term, 1895, and was in due course reached and argued at that term. That thereafter, as your petitioners is informed and believes, the Court was divided in its opinion, and of its own motion ordered a reargument at the next ensuing term; that thereafter pursuant to said order the said appeal was argued before the full bench, but that for some reason unknown to your petitioner, all of the justices did not take part in the decision, although all the members of this Honorable Court were present and sitting when said case was called for argument; and that thereafter, as your petitioner is informed and believes, the Court being still evenly divided in its opinion affirmed the judgment by an evenly divided vote, but without opinion, and that thereafter the record and proceeding were remitted to the Supreme Court of the State of Colorado to enforce the judgment.

Your petitioner respectfully shows that one of the questions principally involved herein, is whether a Federal Court can transfer its jurisdiction, when fully and exclusively acquired, to a State Court, without the consent of the parties interested, or can by *ex parte* orders, authorize and empower the State Court to hear and determine the question of the ownership of personal property which is held by the Federal Court under its lawfully issued mandate, and as to

which it holds exclusive jurisdiction. The said question is one of great public importance, and has never been authoritatively determined by this Court.

That another question of equal public importance is, where a party plaintiff has brought suit in a Federal Court, pursuant to the right given him by the Constitution and the Statutes of the United States, and therein attached personal property, which said property has been taken into the possession and custody of the Federal Marshal under such attachment, and in which proceeding the plaintiff has indemnified the Marshall. Can such party plaintiff against his will, and in violation of the rights conferred by the Constitution and Statutes, be compelled to litigate his rights in the local court, at the instance of a third party suing in replevin. This question, as your petitioner is informed and believes, has never been answered by this Court.

That the affirmance by an evenly divided Court of the judgment herein without opinion does not constitute a precedent that will bind either this or any other Court, Federal or State, and does not furnish an answer to either of the important questions presented herein.

Your petitioner is informed and believes that there is now a full bench of your Honorable Court, and that a decision of said questions can be had that will be final and authoritative.

Wherefore your petitioner prays that this Honorable Court will direct the return of the said records in Zeph T. Hill vs. John Corcoran by the Supreme Court of Colorado, or by whatever Court now holds said records, and will order that the said appeal in Zeph T. Hill vs. John Corcoran be re-

submitted with or without oral argument at this or at the next term of this Court, as to this Honorable Court may seem best, to the end that a majority of this Court may definitely determine the questions so presented by this record as aforesaid. And your petitioner will ever pray, &c.,

Dated April 26, 1897.

ZEPH T. HILL.

I hereby certify that I was the counsel for the plaintiff in error in the above entitled action, both on the argument and reargument in this Court; that I am acquainted with the facts presented by the above petitioner, and certify that, in my opinion, the questions presented herein are of great public importance, and that the petition herein presents a proper case, and good reasons for a rehearing or re-submission before the full bench of this Court.

WM. C. BEECHER,
New York City.

64-703
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C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

UNITED STATES SUPREME COURT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

ZEPH T. HILL,
Plaintiff in Error,

vs.

JOHN CORCORAN,
Defendant in Error.

Brief for Plaintiff in Error.

STATEMENT.

This cause comes up to review the judgment and decision of the Supreme Court of Colorado which, among other things, affirmed the decision of the Superior Court of the City of Denver, overruling a demurrer to the reply.

In or about the month of December, 1886, two suits were commenced in the Circuit Court of the United States in and for the District of Colorado. One suit being in behalf of J. & T. Cousins, a firm residing and doing business in the City and State of New York, against one Louis Witkowski, to recover $629.90. The other being in behalf of the Bay State Shoe and Leather Company, a corporation formed and existing under the laws of the State of New York, against the said Witkowski, to recover $1,888.93.

In both of these actions writs of attachment were duly issued out of the said United States Circuit Court to the plaintiff in error, who was then the duly appointed United States Marshal for said District of Colorado, which said writs directed him to take and hold certain property duly described therein. He accordingly attached the property called for in the warrant.

The defendant in error then applied to the said United States Circuit Court *ex parte* and obtained an order granting him leave to institute his suit upon claim and delivery "against Zeph T. Hill, Marshal of the United "States for the District of Colorado, to replevin the "goods and chattels in said petition described in any "court of competent jurisdiction as he shall be ad-"vised."

Thereupon the defendant in error brought his suit in the Superior Court against Zeph T. Hill *individually* for the recovery of the goods which had been attached by Zeph T. Hlll *as United States Marshal.*

To the complaint filed in that action, the plaintiff in error interposed his answer, setting up, among other things, that he was the duly appointed and qualified Marshal of the United States for the District of Colorado. That there was issued out of the United States Circuit Court for the District of Colorado, a court of competent jurisdiction, and directed to him as said Marshal, two certain warrants of attachment in two certain suits then pending in said Circuit Court, wherein the firm of J. & T. Cousins and the Bay State Shoe and Leather Company respectively were plaintiffs. That he took possession of the goods in question in obedience to the command of said writ of attachment, in his official capacity as such United States Marshal, and not otherwise. And he further alleged that the said Superior Court of Denver had no jurisdiction to entertain or try the suit against him.

To this answer the defendant in error replied, among other things, admitting that plaintiff in error was the

Marshal of the United States for the District of Colorado, and as such Marshal seized and took the goods in question, under and in obedience to the two writs of attachment as alleged in the answer, and then alleged that an order was made and entered in each of said suits, respectively, in the United States Circuit Court for said district, which recited, among other things, that a petition had been filed by John Corcoran "for "leave to bring suit against the Marshal of this dis- "trict, &c., and then ordered:

"Wherefore, it is ordered by the Court that the said "petitioner have leave to institute his suit upon claim "and delivery of personal property against Zeph. T. "Hill, Marshal of the United States for the District "of Colorado, to replevin the goods and chattels in "said petition described, in any court of competent "jurisdiction as he shall be advised."

And that it was under and by virtue of said orders he had obtained full right and authority to bring this suit.

To this part of the reply plaintiff in error demurred, assigning as grounds:

1. That the United States Court gave leave to bring suit against Zeph. T. Hill, Marshal, in his official capacity, whereas the suit was, in fact, brought against him personally and individually.

2. Because the State Court had no jurisdiction to entertain the suit, and that it was beyond the power of the United States Circuit Court to confer jurisdiction.

3. Because the reply did not state facts sufficient to constitute a good reply to the answer.

The demurrer was overruled, and thereafter the issues presented by the pleadings were tried before a jury, and resulted in a verdict for the defendant in error, for the delivery of the property to the defendant in error.

An appeal was then taken to the Supreme Court of Colorado, where the judgment below was affirmed, and the record and proceedings are now brought into this Court upon writ of error to the Supreme Court of Colorado to review the judgment overruling the demurrer, the judgment of said Superior Court entered on the verdict, and the judgment of said Supreme Court in affirming the action of the lower Court.

Assignment of Errors.

The plaintiff in error assigns for error the following :

I.

The Superior Court of Denver, Colorado, erred in that it overruled the demurrer to the reply, because :

1. The United States Circuit Court for the District of Colorado had acquired sole and exclusive jurisdiction of the subject matter involved in this action, and could neither divest itself nor invest the Superior Court of Denver with such jurisdiction.

2. The Superior Court of Denver acquired no jurisdiction over the subject matter of this action or of the person of the plaintiff in error.

3. The order of the United States Circuit Court did not, and did not purport to, confer jurisdiction of this action, as to its subject matter or as against the plaintiff in error, upon the Superior Court of Denver.

4. That this suit was improperly brought against the plaintiff in error in his individual capacity, and not as Marshal of the United States.

5. That this action was brought in the Superior Court of Denver, Colorado, to recover the specific

property then lawfully in the custody of the United States Circuit Court by virtue of its writ of attachment.

II.

The Supreme Court of the State of Colorado erred in that it did not reverse the judgment of the lower Court overruling the demurrer to the reply, because of the errors of the lower Court as assigned above.

III.

The Superior Court of Denver, Colorado, erred in assuming and retaining jurisdiction of an action to retake the specific property then in the lawful custody of the plaintiff in error, as a duly qualified Marshal of the United States, under and by virtue of a warrant of attachment duly issued out of the Circuit Court of the United States for the District of Colorado, and in rendering judgment in such action, and in rendering a judgment in such action directing that the defendant in error was entitled to the possession of the said property.

IV.

The Supreme Court of Colorado erred in affirming the judgment of said Superior Court of Denver, Colorado, wherein it adjudged that the defendant in error was entitled to the possession of said property, which was then in the possession of the plaintiff in error as a duly qualified Marshal of the United States, under and by virtue of a certain warrant duly issued of the Circuit Court of the United States for the District of Colorado, as in the record herein more fully appears.

POINTS.

I.

This appeal presents a Federal question.

Where a State Court attempts to interfere with property in the possession of a Federal Court, a Federal question is presented. This has been inferentially and necessarily decided in the cases herein cited.

II.

The United States Circuit Court having acquired jurisdiction over the property in suit by issuance of its writ of attachment to the Marshal, and that officer having seized the goods called for by the writ, the Federal Court acquired exclusive jurisdiction, and the Colorado Court had no jurisdiction over either the subject matter or over the defendant.

(a) It is now well settled by the decisions of this Court that:

"When property is taken and held under process, "mesne or final, of a Court of the United States, it is in "the custody of the law, and within the exclusive juris- "diction of the Court for which the process has issued "for the purpose of the writ; that the posses- "sion of the officer cannot be disturbed by "process from any State Court, because to disturb "that possession would be to invade the jurisdiction "of the Court by whose command it is held, and to

" violate the law which that jurisdiction is appointed " to administer."

Covell vs. Heyman, 111 U. S., 176, 179, reaffirming Freeman vs. Howe, 65 U. S., 450.

Re-stated and approved in

Byers vs. McAuley, 149 U. S., 608.

This exclusive jurisdiction is retained by the Federal Court until the litigation before it is ended or the possession of the Court or officer is discharged.

Moran vs. Sturges, 154 U. S., 257, 275.

It will be noted that this is not an action in trespass to recover damages for the wrongful act of the Marshal in seizing the goods of plaintiff, under the authority of Buck vs. Calbath (70 U. S., 3 Wall, 334) and kindred cases, but is an action in replevin to recover the specific property seized by the United States Marshal, and was, therefore, a proceeding *in rem*. It was a proceeding to reach the very property which the plaintiff in error had attached under the process of the Federal Court, and it was sought to take such property from the possession of that Court. These proceedings would seem to come clearly and squarely within the rule stated.

This distinction is very clearly stated in a recent decision of this Court, where the facts were identical with the case at bar :

" The property is in his official custody, and under " the control of the Court whose officer he is, and " whose writ he is executing ; and, according to the " decisions of this Court, the rightful owner cannot " maintain an action of replevin against him, nor re- " cover the property specifically in any, except in the " Court from which the writ issued."

Laumon vs. Fensier, 111 U. S., 17.

(b) If the defendant in error felt aggrieved by the

action of the Marshal, and claimed that the property was his own, he had the fullest opportunity to get complete redress in the United States Circuit Court.

For, "Any person, not a party to the suit or judg-
"ment, whose property has been wrongfully, but under
"color of process, taken and withheld, may prosecute,
"by ancillary proceedings, in the Court whence the
"process issued, his remedy for restitution of the
"property or its proceeds while remaining in the con-
"trol of that Court."

Byers vs. McAuley, *supra*.

A full and complete remedy was, therefore, open to the defendant in error, if he had been wronged, in the tribunal which, by its process, had acquired possession of the property in question. But he declined to avail himself of this remedy, and instead went into the State Court of Colorado, and by his action in *replevin* sought to retake from the custody of the United States Marshal the property held by him in his official capacity.

(c) That the property, possession of which was sought to be obtained in this action, is the same property that was attached by the United States Marshal, and that it is the property that was called for by the attachment is conceded by the pleadings. The answer distinctly and fully sets out the issuance of a warrant by the United States Circuit Court, and delivery of same to the Marshal in his official capacity, and that he attached the property called for by said warrant, and held it under such warrant in his official capacity, and not otherwise; and this was all fully admitted in the reply, defendant in error justifying his action by the certain orders of the U. S. Circuit Court, to be more fully referred to below.

III.

The United States Circuit Court could not divest itself of jurisdiction and confer the same on a State Court.

The existence of the rule of exclusive jurisdiction was well known to and recognized by the defendant in error when he commenced the action. He sought to overcome the force of this rule by applying to the U. S. Circuit Court for an order giving leave to sue.

These orders give rise to a number of questions :

1. Could the U. S. Circuit Court divest itself of jurisdiction already acquired and transfer it to a State Court ?

2. Did the orders in question give leave to sue the United States Marshal in a State Court ?

3. Under the order was not the defendant in error obliged to sue the Marshal in his official capacity, and could he sue him as an individual for his official acts ?

1. We find no authorities upon this question, but as an original question it seems very plain that where a Court has acquired *exclusive* jurisdiction it cannot upon an *ex parte* application divest itself of such jurisdiction and confer the came upon some other Court.

Jurisdiction of the Federal Courts is conferred under the Constitution by the statutes (Goldey vs. Morning News, just decided in this Court, but unreported). Jurisdiction is a right created and a duty imposed, and in the absence of some statutory provision it cannot change either the right or the duty.

Had the Circuit Court vacated the attachment, dismissed the complaint or remanded the entire proceedings to the State Court, another question would have

been presented. But it will be observed that the Circuit Court *retained the suit*, continued the attachment, still held the property in its possession, and yet, if the contention of defendant in error be correct, gave to him leave to sue by replevin in the State Court for these very goods. This, as we have seen, cannot be done.

2. But do these orders in fact give any authority to the defendant in error to sue in the State Court?

An examination of these orders (p. 13 of Record) show that they were issued on the petition of defendant in error after leave to sue the Marshal of the district, and the Court ordered that he have leave to institute his suit against "Zeph. T. Hill, Marshal of the United States for the District of Colorado," to replevy the goods and chattels in said petition described *in any Court of competent jurisdiction*, or as shall be advised.

This was not an order to transfer the causes to a State Court. It was not an order vacating the attachment or in any manner affecting it. It was merely a formal permission to sue an officer of the United States in any Court of *competent jurisdiction*.

If at this time the Federal Court had acquired *exclusive jurisdiction*, then the State Court was not a Court of competent jurisdiction, and the orders would be no authority for instituting these procedings therein.

It seems apparent from the face of the orders that they were not intended to transfer jurisdiction, but merely to permit proceedings to be instituted against the Marshal of the United States for his official acts.

3. The present proceedings did not follow the permission given by these orders.

The recital shows that petitions were filed "for leave "to bring suit against the Marshal of this district," and the order grants leave "that the said petitioner "have leave to institute his suit upon claim and de-

"livery of personal property against *Zeph. T. Hill,* "*Marshal of the United States for the District of Colo-* "*rado,* to replevy the goods, &c."

An officer of the United States, while acting officially pursuant to a mandate or process of a United States Court, cannot be held liable *individually* for his acts under such mandate or process.

Davis vs. So. Carolina, 107 U. S., 597.
Tenn. vs. Doris, 100 U. S., 257.

The permission was confined to leave to sue Zeph. T. Hill in his official capacity as Marshal and not in his private and individual capacity. An examination of the complaint will show that the suit actually brought was against Hill as a private individual. Neither in the caption nor in the body of the pleading is there the slightest reference to his official position or his official acts. It would, therefore, seem that the defendant in error neglected to proceed within the terms of the order of the Circuit Court.

IV.

The judgment of the Supreme Court of Colorado affirming the judgment of the Superior Court of Denver was erroneous, and should be reversed.

M. B. Carpenter,
Jos. N. Baxter,
Attorneys for Plaintiff in Error.

Wm. C. Beecher,
Of Counsel.

164-703

Office Supreme Court U. S.
FILED.
JAN 8 1894
JAMES H. McKENNEY,
CLERK.

164-703

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 681.

ZEPH. T. HILL, PLAINTIFF IN ERROR,

vs.

JOHN CORCORAN, DEFENDANT IN ERROR.

Brief of Plaintiff in Error on Motion to Dismiss or Affirm.

Now comes the plaintiff in error, by his attorney, in answer to the motion to dismiss the writ of error in this cause.

STATEMENT.

A writ of attachment issued out of the United States circuit court for the district of Colorado was placed in the hands of the plaintiff in error, Zeph. T. Hill, as United States marshal, by which he was directed to attach the property which is the subject of this action (see fols. 10 and 11 of Record). In obedience to the terms of the mandate and acting as such marshal he attached the property and held it as United States marshal. Defendant in error, Corcoran, then brings suit against Hill in replevin.

Before bringing suit Corcoran obtains an order from the United States circuit court giving him leave to sue Zeph. T.

Hill, *marshal of the United States for the district of Colorado*, to replevy the goods, &c.

The complaint was in the usual form for replevin, but the action was brought against Hill personally and not as United States marshal.

In his answer Hill sets up that he had attached the goods in controversy only as marshal by virtue of the attachment issued out of the United States circuit court, and that the State court of Colorado had no jurisdiction over him. To this Corcoran replied setting up the orders of the United States circuit court (p. 13 of Record) giving him leave to sue Hill, marshal, &c., and admitting that Hill was marshal and that as marshal he had taken the goods.

To this reply Hill demurred (p. 16) upon the grounds—

1. That the order of the circuit court permitted the action to be brought against Hill only as marshal, whereas the action was brought against him individually.

2. That the State court never acquired jurisdiction, and

3. That sufficient facts were not alleged.

The demurrer was overruled and on appeal the supreme court of Colorado sustained the defendant in error.

This cause was entered in this Court in December, 1891. No steps of any kind were taken by the defendant in error until December, 1893, when, after waiting *two years*, he moves to dismiss the writ of error or affirm the judgment upon the grounds—

1. That the record does not present any Federal question.

2. That if any such questions were presented they had been correctly decided below, and

3. That the record fails to show the judgment of the superior court of Denver, where the cause was tried.

ARGUMENT.

I.

The record clearly presents a Federal question.

The answer sets out plainly and distinctly that the plaintiff in error, acting as an officer of the United States and in obedience to a mandate of the United States court, and proceeding only and wholly in his official capacity, attached and held the goods which form the subject-matter of this action, and this was admitted by the reply.

So that the pleadings present the question, Has a State court jurisdiction to proceed in replevin against an officer of the United States who, in his official capacity, in obedience to a writ of the United States court, attaches certain goods?

It has been repeatedly held by this Court that the State court has no jurisdiction under such circumstances, the United States court's jurisdiction being exclusive.

Covell *vs.* Hyman, 111 U. S., 176.
Kerppendorf *vs.* Hyde, 110 U. S., 276.
Buck *vs.* Colbath, 3 Wall., 334.

The rule is laid down with great distinctness in Covell *vs.* Hyman:

"*The forbearance which courts of co-ordinate jurisdiction administered under a single system exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord; but between State courts and those of the United States it is something more. It is a principle of right and of law and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system so far as their jurisdiction is concurrent, and although they co-exist in the same space they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not*

in the same plane; and when one takes into its jurisdiction a specific thing that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process and the decision of questions relating to it are part of the jurisdiction of the court from which it issues."

This case does not present the question so often raised whether the marshal actually proceeded in conformity with the writ of the United States court, because the answer alleges specifically that he acted solely in his official capacity and under and by virtue of the writ of attachment, and the reply admits that that part of the answer is true.

II.

But the defendant in error claims that the United States court waived or delegated its authority to the State court.

a. In the first place, it is not easy to see just how the Federal court could delegate its jurisdiction once acquired over the property in question. The power of donation of jurisdiction does not exist.

b. But, in the second place, the defendant in error did not follow the terms of the Federal court's order which purported to give leave to sue plaintiff in error as United States marshal. Instead he sued him in his individual capacity, and then by his reply admitted that all of his acts complained of had been done solely as marshal and not as an individual.

It being clear that this court has jurisdiction, the motion to affirm should be denied.

Whitney *vs.* Cook, 9 Otto, 607.

III.

The decision on the demurrer, being only interlocutory, could not be reviewed in this Court until final judgment. The appeal from the final judgment in the State supreme court brings up for review the demurrer, and it is the issue presented by the decision that it is desired to review in this Court.

IV.

A motion to dismiss for defective record should have been made with promptness. Waiting two years after the record has been filed is such neglect on the part of the defendant in error as should lead to a denial of that part of his motion.

The omission of the judgment on the demurrer was evidently an act of inadvertence on the part of plaintiff in error's attorneys, and if the Court deem it necessary to have such judgment before it, then a writ of certiorari should be allowed to plaintiff in error to bring up such judgment to complete the record.

HENRY WISE GARNETT,
Attorney for Plaintiff in Error.

164-703

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

164-703

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. ~~861~~ 681

ZEPH T. HILL, PLAINTIFF IN ERROR,

vs.

JOHN CORCORAN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

S. F. PHILLIPS,
F. D. McKENNEY,
Attorneys for Defendant in Error.

C. S. THOMAS, Esq., *Of Counsel.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. ~~867.~~ 681

ZEPH T. HILL, PLAINTIFF IN ERROR,

vs.

JOHN CORCORAN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, by his attorneys, and moves the Court to dismiss the writ of error in this cause for the following reasons, to wit:

1. The record does not present any Federal question for the consideration of this Court.

2. If a Federal question was involved in the proceedings in the State courts it was correctly decided.

3. The record is fatally defective in that neither the verdict of the jury nor the judgment of the superior court of the city of Denver, wherein this cause was tried in the first instance, if any there was, appears therein, nor can the terms of such judgment, if, indeed, any was rendered, be ascertained from the judgment of the supreme court of the State of Colorado, to review which the writ of error was sued out.

S. F. PHILLIPS,
F. D. MCKENNEY,
Attorneys for Defendant in Error.

STATEMENT.

Corcoran sued Hill in the superior court of the city of Denver for the recovery of certain cases of boots, shoes, slippers, etc., which he claimed as his own and which he alleged Hill wrongfully held and detained, to plaintiff's great damage, and he prayed as an alternative, in the event of delivery thereof being for any reason impossible, judgment for $3,510.75, the value thereof.

Hill admitted the seizure and detention of the goods specified, declared that at the time of the taking and also at the date of suit he was United States marshal for the district of Colorado, and justified his action in the premises under two certain writs of attachment issued out of the circuit court of the United States for said district in the suits of Cousins *vs.* Witkowski and Bay State Shoe and Leather Co. *vs.* Witkowski, which suits were still pending in said court. He therefore denied the jurisdiction of the State court "to issue the writ of replevin in this suit" or "to entertain this suit against this defendant." He also alleged that the transfer of title to the goods in question from Witkowski to Corcoran was collusive and fraudulent, and that at the time of their seizure they were the property of Witkowski.

Plaintiff's replication admitted the official character of the defendant and the taking of the goods under the circumstances narrated, denied the charge of fraud and collusion, reiterated his claim to the goods, and justified the proceedings in the State tribunals by virtue of two orders issued by the circuit court of the United States and made of record in the cases against Witkowski pending in that tribunal prior to the bringing of the suit in the Denver superior court.

The orders referred to are in the following words:

"At this day comes John Corcoran, petitioner, by Charles Hartzell, Esq., his attorney, and the petition of said Corcoran for leave to bring suit against the marshal of this district coming on now to be heard, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said petition be granted.

"Wherefore it is ordered by the court that the said petitioner have leave to institute his suit upon claim and delivery of personal property against Zeph T. Hill, marshal of the United States for the district of Colorado, to replevin the goods and chattels in said petition described in any court of competent jurisdiction as he shall be advised." (R., pp. 13, 14.)

To this replication Hill demurred, because—

(1) The said orders gave leave to bring suit "against Zeph T. Hill, marshal," &c., while the suit was actually against him in his individual capacity;

(2) The State courts did not have jurisdiction to issue the writ of replevin in this suit, nor to entertain the suit at all, and it was beyond the power of the United States circuit court, "by any order or other proceedings, to confer jurisdiction upon this Court in the matter of this suit," and

(3) The facts stated did not constitute a good reply to defendant's plea.

It appears from the opinion of the State supreme court, sent up with the record, that this demurrer was overruled and the "cause was tried upon the main issue, as to the character of the sale to Corcoran." "The jury found for the plaintiff," but whether any judgment was entered upon such verdict does not appear. (R., p. 18.)

ARGUMENT.

The record presents no Federal question.

To give this Court jurisdiction of a writ of error to a State court it must appear that in the course of the trial below there was "drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States and the decision is against its validity; * * * or that a title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party."

The mere fact that the pleadings aver a Federal question is not sufficient. There must at least be color of ground for such averment; otherwise a Federal question might be set up in almost any case and the jurisdiction of this Court invoked simply for the purpose of delay.

New Orleans *vs.* N. C. Water Works Co., 142 U. S., 79, 87.

And so it is that, although the record may apparently present a Federal question, if upon investigation it is ascertained to be only such in form, but not in substance, there is sufficient color for a motion to dismiss, and even if it be held that under the circumstances incident to a particular case the motion to dismiss should be denied, nevertheless

the motion to affirm joined therewith may properly be granted.

E. Tenn. Va. & Ga. Ry. Co. *vs.* Frazier, 139 U. S., 288.

Hill sought to defend the action brought against him in the State court on two grounds:

(1) The want of jurisdiction in that court to issue the writ of replevin in such a suit; and

(2) A personal exemption from such suit based upon the official character of his acts.

The first of these objections apparently rests upon the fact that the goods sought to be replevined are in the custody of a Federal tribunal, and hence, *notwithstanding the waiver of right to exclusive jurisdiction in the premises by the Federal court*, could not be sued for in a State court.

The second objection is to the effect that, having made the levy in question in his official capacity and under color of Federal process, he cannot be called to defend in a State court, although it be alleged that the seizure was wrongful.

It is submitted that neither position is well taken.

As is well understood, the Federal and State courts have concurrent jurisdiction in many classes of cases, and in order that the chances for a conflict between the tribunals of the two sovereignties may be at least lessened, if not entirely obliterated, it has become settled that the court which first obtains jurisdiction MAY maintain it to the end of the litigation to the exclusion of all others.

But this rule is expressly confined in its operation to the parties before the court or who may, if they wish to do so, come before the court and have a hearing upon the issue to be decided. It is limited in its application by the nature of the remedies and the character of the relief sought and the identity of the parties in the different suits. So it has been ruled in *Buck* vs. *Colbath* (3 Wall., 334), which was a suit brought by Colbath in the proper State court against Buck for an alleged trespass in taking away goods wrongfully.

Buck pleaded as a defense that he was marshal of the United States for the district of Minnesota and had seized the property in question by virtue of a writ of attachment issued out of the circuit court of the United States in a suit therein pending, and it was held by this Court that the fact that the goods had been so seized did not deprive the State court of jurisdiction to try the title thereto in an action for trespass against the marshal.

A sharp distinction is drawn between that case and the case of *Freeman* vs. *Howe* (24 How., 450), wherein it was sought to deprive the circuit court of the United States. against its will, of possession of goods seized under color of its process by a writ of replevin issued out of a State court. That this cannot be done is settled; but as to all other remedies to which a person whose goods have been wrongfully seized under color of process may be entitled, either against officers or parties, "he may pursue them in any tribunal, State or Federal, having jurisdiction over the parties and the subject-matter."

Covell *vs.* Heyman, 111 U. S., 176.
Byers *vs.* McAuley, 149 U. S., 614.

There is "nothing, therefore, in the mere fact that the writ issued from the Federal court to prevent the marshal from being sued in the State court, in trespass for his own tort in levying it upon the property of a man against whom the writ did not run and on property which was not liable to it."

Buck *vs.* Colbath (*supra*).

So it appears that a United States marshal is not personally exempt from liability to suit in a State tribunal merely because the act complained of was done by him in his official character and under a Federal writ properly issued.

"Where it is not sought forcibly to invade the Federal

jurisdiction, neither the writ under which he acted nor his official character will afford the marshal any defense."

Bock *vs.* Perkins, 139 U. S., 628.

It is apparent that the plea of personal exemption from suit in State tribunals set up by Hill is without foundation. True it is that in such actions against a Federal marshal for wrongful seizure he may, by complying with the requirements of the statute, remove the same into the Federal courts for determination.

Bock *vs.* Perkins (*supra*).

But in the absence of all attempt so to remove the proceeding, it would seem to be worse than useless to contest the jurisdiction of the State court on the ground of official action or character.

The cases of Taylor *vs.* Carryl (20 How., 583), Freeman *vs.* Howe (24 How., 450), and subsequent like cases all deny the right of the courts of one sovereignty to interfere with goods or property in the possession of the courts of a different sovereignty under color of process, no matter whether such possession may have been acquired properly or improperly; and the reason for this principle, which has become so firmly and, indeed, so necessarily, rooted in our complex system of jurisprudence, is uniformly stated to be the necessity for the avoidance of unseemly conflict between the two tribunals, and possibly between their respective sovereignties. No government could maintain the adm nistration or execution of its laws, either civil or criminal, if the jurisdiction of its judicial tribunals were subject to forcible invasion by courts of different sovereignties.

This right to maintain exclusive jurisdiction in such cases is founded upon principles of " comity and necessity." The question involved is not whether jurisdiction exists in the opposing tribunals, but it relates solely to the propriety of its exercise. Unless it be established that the opposing

tribunals possess concurrence of jurisdiction over the cause of action or subject-matter, as the case may be, the necessity for the rule announced in Freeman *vs.* Howe could not arise. Hence it is that we inquire not whether the State court has jurisdiction in the premises, but ought it to exercise such jurisdiction? Should not the State court refrain from exercising its jurisdiction until the control of the other court has terminated?

Smith *vs.* Bauer, 9 Colo., 381.

If the court in possession of the *res* should insist upon the right to determine for itself all matters pertaining thereto, the answer to the above question must undoubtedly be in the affirmative. But may not such court, for "good and sufficient reason to it appearing," relinquish its right to the maintenance of exclusive jurisdiction in the premises and consent to the institution of collateral proceedings to determine the title to the *res* in another tribunal? No law forbids such consent. When once the Federal tribunal has consented the reason for the decisions above referred to falls.

Cessante ratione legis cessit ipsa lex. Co. Lit., 70.

The whole problem considered in the above-noted cases is the avoidance of conflict in the exercise of powers between two courts acting under authority conferred by different sovereignties, but exercised within the same general territorial limits. When this problem is solved by the amicable action of the respective courts themselves no good reason appears why either may not proceed to a finality with such matters as may properly be within the scope of its jurisdiction.

In the absence of objection on the part of the parties to the original suit the granting of the consent by the Federal tribunal herein relied upon would seem to be unimpeachable, and certainly it would not lie in the mouth of the marshal, a mere ministerial officer, whose sole authority in

the premises is derived from the process of the court, to object to any disposition of the cause which to the court may seem proper.

It is true that by the levy the marshal acquires a *special* property in the chattels seized, but this is merely sufficient to enable him to maintain possession thereof *until the further* order of the court. It certainly gives him no such interest in the *res* as entitles him to dictate the method to be pursued in determining the question of title thereto, and in the absence of such an interest he is not competent to raise a Federal question upon which to sustain a writ of error to this Court.

That this is true must follow from the well-settled principle that there is inherent in every court the "power to supervise the conduct of its officers and the execution of its judgments and process. Without this power courts would be wholly impotent and useless."

Griffin *vs.* Thompson, 2 How., 244, 257.
Eton *vs.* C., St. L. & K. C. R'y Co., 41 Fed. Rep., 421.

And this power extends even to the granting of a perpetual stay.

Monroe *vs.* Upton, 50 N. Y., 593.
Keeler *vs.* King, 1 Barb., 390.
Parks *vs.* Goodwin, 1 Mich., 35.
Hamson *vs.* Sales, 6 Pa. St., 393.

If the court having possession of the *res* may stay or quash the process under which it was seized and is held, for the purpose of preventing wrong or oppression, why may it not do less in the same line? The power to quash would include the power to stay for purposes of investigation, &c. In the exercise of its discretion in quashing a writ of attachment the court is surely not subject to the control or objection of its marshal. No more so, indeed, are the methods which it may see fit to adopt for the purpose of informing

itself whether the goods in his custody are rightfully held. As well might a receiver in a Federal court object to an order of the court permitting him to be sued in a State tribunal.

"It is for the court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver or may reserve to itself the determination thereof."

Porter *vs.* Sabin, 149 U. S., 473–479.

Is not this rule applicable to the point here in controversy? It would seem to apply as well to one officer of the court as to the other, and the only person who might, perhaps, be permitted to object to its application would seem to be the plaintiff in the current court proceedings, who in the case at bar by silence must be deemed to have assented to the proceeding in the State tribunal.

It is for the court having possession of the *res* to determine in its wise discretion whether it will maintain its right to deal therewith exclusively, or whether it will waive such right either temporarily or finally in favor of some other competent tribunal. This right to insist upon the maintenance of exclusive jurisdiction belongs to the court alone. It is not a right in anywise pertaining to the marshal or his duties, nor is it a matter in which he has any personal interest. He is not, therefore, in such a situation as entitles him to raise a Federal question by objecting to the proceedings in the State court.

Giles *vs.* Little, 134 U. S., 645.

Ludeling *vs.* Chaffe, 143 U. S., 301.

It appearing, then, that the State court was possessed of full power and authority to proceed in the premises, its determination of the merits of the controversy is not subject to review in this court on writ of error.

The claim of personal exemption from suit in the State court set up by the marshal has been shown to be without foundation. His claim that the goods seized were the goods of Witkowski and not the goods of Corcoran, involved a matter of fact which was determined adversely. The authority conferred upon him under the laws of the United States was not denied. The validity of the writ under which he acted was not questioned. The sole authority of which he could properly claim to be possessed was authority to attach the goods of Witkowski. He had no authority to attach the goods of Corcoran, and it does not appear from the record that he claimed to possess any such authority. But even if it be thought that his plea sets up a *claim of authority to seize the goods of one* not named in the writ, such claim would not serve to raise a Federal question entitling him to be heard here.

To subject the judgment of a State court to examination here there must be *something more than the bare assertion of the existence of an authority* exercised under the United States. As was said by this court in Millingar *vs.* Hartupee (6 Wall, 258)—

"The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against *claims of authority* under the United States.

"In respect to the question we are now considering 'authority' stands upon the same footing wih 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and looking into the record it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted

that this court could review the decision of a State court that the right claimed did not exist."

The concurring judgments of the State courts turned upon the verdict of the jury establishing the title to the goods in controversy to be in Corcoran. This was a finding of fact upon the submission of the whole case before a competent tribunal. It involved no question of Federal law and, therefore, is not reviewable here.

Merced Mining Co. *vs.* Boggs, 3 Wall., 304.
Crary *vs.* Lewis, 3 Wall., 106.
Choteau *vs.* Marquette, 12 Pet., 507.
St. Paul, Minn. & M. R'y Co. *vs.* Todd Co., 142 U. S., 282.

Although the pleadings prior to the filing of the replication may have apparently presented a Federal question, such question disappeared upon the showing made by the replication, and the demurrer thereto was properly overruled. The writ of error should be dismissed. But if, for any reason, it be thought otherwise, then it is urged that the judgment of the State court having turned upon the finding of the jury based upon the submission of the whole case, it should be affirmed.

Irrespective of the foregoing considerations the writ of error should be dismissed because of the defective character of the record.

It does not appear affirmatively that any judgment at all was rendered in the superior court of Denver.

In Sweeny *vs.* Lomme (22 Wall., 208–215), at the argument, attention was called to the fact that there was no judgment to be found in the record, and upon inspection the court found "that while the judgment of the supreme court of the Territory merely in terms affirmed the judgment of the district court, the judgment of the district court was not

in the record, and in fact no judgment was to be found in the record which we could either reverse or affirm."

Under the circumstances of that case, *as the defendants in error had made no objection by motion to dismiss the writ or otherwise before the hearing*, the court heard the argument, and of its own motion granted time to the plaintiffs within which to perfect the record.

In the absence of objection on the part of the defendant in error in that cause no exception can be taken to the indulgence extended to the plaintiffs therein. But upon motion to dismiss, such a defect would entail more serious consequences, and that such a motion when made in due season would prevail is the plain intimation of the court.

S. F. PHILLIPS,
F. D. MCKENNEY,
Attorneys for Defendant in Error.

C. S. THOMAS, Esq., *Of Counsel.*

164-703.

FILED.
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JAMES H. McKENNEY,
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Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 72.

ZEPH T. HILL, PLAINTIFF IN ERROR,

vs.

JOHN CORCORAN, DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

S. F. PHILLIPS,
F. D. MCKENNEY,
For Defendant in Error.

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This is a writ of error to the supreme court of the State of Colorado.

At the commencement of the opinion of that court (Record folio 30) is a brief statement of the facts in the case as follows, which we adopt as in general sufficient for the purposes of this brief:—

"*This was an action of replevin* brought by the appellee (defendant in error) Corcoran, against Hill, *to recover the possession of certain property alleged to have been unlawfully taken, with damages for the detention.* Hill defended, and justified the taking under mesne processes of attachment issued out

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of the Federal court in Colorado in two cases, in one of which Cousins and others were plaintiffs, and Louis Witkowski was defendant; and in the other of which the Bay State Shoe & Leather Company were plaintiffs, and Witkowski was likewise defendant. [The defendant not only contested the jurisdiction of the court over him in this suit, but further defended on the ground that the sale between Witkowski and Corcoran, under which Corcoran claimed title, was fraudulent as against creditors, and consequently that the transfer was indefensible.] Issue was taken by the plaintiff, Corcoran, upon the various matters set up in the answer, and he justified his suit and attempted to sustain the jurisdiction of the court by setting up leave of the Federal court to institute the particular suit by an order duly entered for the purpose. The replication was demurred to, as to so much of it as set up the authority to institute this suit under leave granted, on the theory that the Federal court was without jurisdiction to grant the leave, and that under the order, or by reason of it, or under any circumstances, the State court could acquire no jurisdiction, because the property had been seized by the marshal. *The demurrer was overruled* and the cause *tried upon the main issue as to the character of the sale to Corcoran.*"

The matter in this statement enclosed by us in brackets, involved questions of *State law* only; and therefore requires no further attention here.

The entry of *leave* to Corcoran to bring suit against the marshal is as follows (p. 13): *At this day comes John Corcoran, petitioner, etc., and the court being now sufficiently advised in the premises, &c., "It is ordered by the court that the said petitioner have leave to institute his suit upon claim and delivery of personal property against Zeph T. Hill, marshal of the United States for the district of Colorado, to replevin the goods and chattels in said petition described in any court of competent jurisdiction, as he shall be advised."*

Upon the trial in the superior court of the State verdict and judgment were rendered for Corcoran, as follows, (Rec., after p. 28, *upon Certiorari* p. 2):—

"We, the jury, find that the said plaintiff is the owner of and entitled to the possession of the said goods and chattels in his said complaint and writ demanded, and that the value of said goods was on the day of the taking thereof the sum of three thousand five hundred and ten and seventy one-hundredths dollars ($3,510.70), and that the said plaintiff has sustained damages by occasion of the premises in the sum of ninety-three and sixty one-hundredths dollars.

"Therefore it is considered by the court here that said plaintiff do have and recover of and from said defendant the possession of the goods and chattels in said plaintiff's complaint and writ demanded, and that a writ issue therefor; and it is further considered by the court that in case a return of said property cannot be had, then the said plaintiff to have and recover of and from the said defendant the said sum of three thousand five hundred and ten and seventy one-hundredths dollars, the value of said goods and chattels, and also the further sum of ninety-three and sixty one-hundredths dollars, his damages aforesaid in form aforesaid assessed, and also his costs in this behalf laid out and expended, to be taxed, and have execution therefor. Thereupon it is considered by the court that the said jury be discharged from further consideration of the premises and go hence hereof without day."

Upon appeal to the supreme court that judgment was affirmed.

Therefore, the general question raised in the record is whether courts of a State have jurisdiction of a *code proceeding* which concerns personal property in the hands of a United States marshal, *to the extent that the present proceeding does*. It seems to have been assumed that by entertaining such proceeding the State court has interfered with the possession

of the marshal. Upon that hypothesis the defense was grounded mainly upon "*leave granted*" by the Federal court under whose process (*attachment*) the marshal had taken and was holding possession.

Upon this writ of error however there seems to be a preliminary question, *i. e., whether the record shows any interference with the possession of the marshal; or directly threatens any interference with it hereafter?*—inasmuch as, if it does not, any inquiry into the theoretical, *possible* effect of the *leave* alleged may be superfluous.

The suit, brought after the above leave, is in form *replevin* under the usual Code of Civil Procedure. As to code procedure we may, *ex abundanti*, be allowed to submit a remark by *Pomeroy* in his well-known treatise upon "Remedies and Remedial Rights," section 111, as follows:

"The practice, since the codes, sometimes indulged in by courts in their solemn judgments, of retaining the ancient nomenclature, and of describing a given cause as 'trespass,' 'trover,' 'assumpsit,' and the like, is productive of confusion, and of confusion alone. No practical rules or doctrines in the administration of justice according to the reformed system of procedure result from these old forms; no practical aid in the decision of a cause is to be obtained from regarding it as 'trespass,' or 'trover,' or 'assumpsit;' or from giving it any other name. No difficulties are removed nor doubts cleared up by resort to this method of description. On the other hand there is a constant tendency to associate with these names the rules and doctrines which were once inseparable from them, but which have been in the most positive manner abrogated by the legislature; in fact much doubt and confusion which even yet accompany the administration of justice in those States which have adopted the reform system of procedure is due to the retention of these names by the bench and the bar."

Boley *vs.* Griswold, 20 Wall., 486, was a case of *code replevin* from the Territory of Montana, whose code was substantially the same as that now in question. (Laws of 1871–'2, pp. 28, 49, &c.) Verdict had been given for a return of the chattels, and, in case this could not be had, for the *value* thereof, &c. Thereupon the court entered a judgment for the value only. Upon appeal the form of the judgment was assigned as error, but this Court said:

"It is true that under the Civil Practice Act of Montana there can be no judgment for the value if there can be a delivery of the property, but it is not true that the judgment is necessarily erroneous if the alternative is not expressed upon its face. The court must be satisfied that the delivery cannot be made before it can judge absolutely the payment of money. But if so satisfied, it may so adjudge. A special finding to that effect is not necessary. An absolute judgment for the money is equivalent to such a finding. * * * The presumption is in the absence of anything in the record to the contrary that before it was rendered the court had become judicially satisfied that the property could not be returned."

It is true that in the present case the judgment was in the ordinary alternative form; nevertheless as it is strictly more according to practice and routine not, in cant phrase, to leap before the style is reached, but to award an alternative judgment, and await a return by the sheriff that possession cannot be had, before confining the remedy to an enforcement of the second alternative, that case may be referred to as showing that the employment of such a civil action as *might be, but in fact is not* attended by the incident of *claim and delivery* does not necessarily threaten such an attempt upon possession as raises a Federal question.

Accordingly it is submitted that in considering the question involved in the record nothing is to be gained by calling the suit "replevin."

How far the action *as defined by the pleadings and judgment in the record* has violated well-established rules securing the possession of United States marshals against the effect of process issuing from courts of a State, is to be determined only by a scrutiny of the effect of the very procedure set forth in the record.

We shall contend that—

Upon the face of the record the present suit neither interferes with, nor threatens interference with, the possession of the marshal.

However, conceding, for the purpose of a second defense, the existence of such interference, we rely upon the circumstance that—

The suit was brought by leave of that Federal court whose writ had authorized the marshal's possession.

The provisions of the Colorado Code of Civil Procedure upon *Claim and Delivery*, so far as material here, resemble those of all such codes; and are as follows: See General Statutes, 1883;—*additional* pp. 25, etc., following *regular p. 1428:* also *Rice's Code* (ed. 1890), pp. 191, &c.

After providing in the usual terms for "One civil action" (secs. 1 and 33), it created the usual "provisional and auxil-

iary remedies,"—amongst which are the following (*our italics*):

"SEC. 79. The plaintiff in an action to recover possession of personal property, may at the time of filing the complaint, or issuing the summons, or *at any time before judgment*, claim the delivery of such property to him as provided in this chapter."

"SEC. 80. Where a delivery is claimed, an affidavit shall be made by the plaintiff, or some one in his behalf, showing:" [that he is the owner of the property claimed, that the property is wrongfully detained by the defendant, etc.]

"SEC. 81. The plaintiff or his agent shall file with the clerk of the court a written undertaking, executed by two or more sufficient sureties, approved by the clerk, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action without delay and with effect, and for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff. *The clerk shall thereupon issue a writ requiring the sheriff to forthwith take the property described in the affidavit, if it be in possession of the defendant, or his agent, and retain it in his custody until delivered as hereinafter provided.* The sheriff shall also, without delay, serve on the defendant a copy of the writ by delivering to him personally if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual abode of the defendant, with some member of his family over the age of fifteen years; or if he has no place of abode, by putting such copy in the nearest post-office, directed to the defendant."

The other sections of the chapter provide for details not pertinent in this connection.

In the light of the above provisions, it appears upon the record that although the plaintiff *obtained leave* to resort to a proceeding having certain characteristics of replevin, yet that in fact, he did not do so, but prosecuted a simple code action which might have authorized such auxiliary proceeding, but which in fact ended in an *alternative* judgment, for either *the possession* of certain goods; *or*, if that could not be had, *their value*. The plaintiff's affidavit, filed with the complaint (p. 5), is obviously defective as a prerequisite (sec. 80) to a "delivery," and as he did not file with the clerk *a written undertaking, with sureties in double the value*, etc., as required by section 81, it is manifest that he did not seek to entitle himself to issue a "*replevin*" writ requiring the sheriff to take possession of the property. Accordingly no such writ has been issued. And furthermore, inasmuch as "judgment" has now been taken in the principal action, it is plain by section 79 that he cannot "replevin" at all.

It is therefore submitted that the only apprehension of a collision between the process of the State court and the possession of the marshal must arise from some proceeding which may regularly follow the "judgment." But such proceeding, (differing therein from the *absolute* exigency of the writ under *claim and delivery:* "sec. 81," above) must have an alternative execution, viz, for possession, *or* "in case a return of said property cannot be had," for its value. Admitting therefore the law as to the effect of the *leave* in question to be as claimed on behalf of the plaintiff in error; and assuming besides, as is usual in such cases, that the State court will correctly administer the code action for the remainder

of its proceedings, it cannot be doubted that upon the former alternative in the judgment, the sheriff will return that *no goods are to be found* within his jurisdiction; and that thereupon execution will issue upon the second alternative.

Therefore it is true not only that no collision betwixt State and Federal authority has yet occurred, but that none is reasonably to be apprehended,—the present action amounting in effect to no more than one of *trespass* against the marshal, with the value of the goods as the measure of damages.

In the common-law form of replevin possession was necessarily interfered with. Similarly, therefore, in the leading case of Freeman *vs.* Howe, 24 How., 450, 453, the "cars" in suit had been "taken out of the possession" of the marshal by the sheriff; and so, in Taylor *vs.* Caryl, 20 How., 583, 592, the "barque" had been "attached." And in Feusier *vs.* Lammon, 6 Nev., 209 (the general litigation in which appeared at another point in this court, 111 U. S., 17), where the principal details were the same as here, the sheriff actually took the attached property from the custody of the marshal, under claim and delivery.

Such also is the purport of the reasoning in Buck *vs.* Colbath, 3 Wall., 334, and in the recent cases, Byers *vs.* McAuley, 149 U. S., 608; Moran *vs.* Sturges, 154 U. S., 256, and Shields *vs.* Coleman, 157 *ib.*, 168.

Upon the whole, it is also to be observed that the action in question created no lien *by being filed*, as is the case with certain bills in equity; also that it does not necessarily require for its FRUITS a seizure of the goods mentioned in the

declaration; and besides that a suit for the *value* of unsold goods differs in principle from one for their *proceeds*, after sale.

In case that it shall appear hereafter that the sheriff, in disregard of the limits of his bailiwick, (see Covell *vs.* Heyman, 111 U. S., 176, 182,) has taken possession of the goods in question, instead of returning under the suggestion of the judgment, that they "cannot be had," the question suggested by this writ of error may arise. Until then it is premature: there being no more reason at present to apprehend that upon consideration the Colorado sheriff will seize these goods than that he will pass the *geographical* bounds of the State and seize goods, say, within the State of Kansas.

The above view of what are supposed to be the essential features of this case may be ended by submitting that if *the order* given in the United States court were erroneous, as contemplating a taking from the marshal of goods which the latter had regularly attached in a suit pending in that court, that error might have been corrected either *there*, or upon appeal. It is said that Corcoran's application for leave was *ex parte*. That application and also the leave were by themselves merely *frustra*. But as soon as the marshal had been notified of their effect, by an attempt to seize, either he or the plaintiff in the attachment could in turn have applied to the United States court and been protected, at all events upon appeal.

In conclusion, if the special question discussed in the brief for the plaintiff in error shall be considered by the Court as sufficiently presented in the record, we cannot do better in that connection than rely upon the clear and able Opinion of the learned court below, as found upon pp. 18 to 22 of the record.

With this general reply to the several assignments of error in the brief of the learned counsel for the plaintiff, nothing more occurs to say except that the questions raised under the 2d and 3d paragraphs of *assignment III*, might perhaps have been better tested by applying to the court which granted the leave; and that moreover they are not *Federal*. The court which granted and that which received the leave seem not to have differed in its construction. Besides, leave to sue *A. B. Marshal*, and leave to sue him *as Marshal* may well differ in meaning, the word "Marshal" in the former connection being merely *descriptio personæ*.

S. F. PHILLIPS,
F. D. MCKENNEY,
For Defendant in Error.

C. S. THOMAS,
Of Counsel.

164-703

Office Supreme Court, U. S.
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CLERK.

IN THE

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OCTOBER TERM, 1896.

No. 9.

ZEPH T. HILL, PLAINTIFF IN ERROR,

vs.

JOHN CORCORAN, DEFENDANT IN ERROR.

ON REHEARING.

BRIEF FOR THE DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR ON REHEARING.

Statement.

The case comes before the Court on a writ of error to review a judgment of the supreme court of Colorado.

Corcoran sued Hill in the superior court of the city of Denver under the provisions of the Colorado Code of Civil Procedure for the recovery of certain cases of boots and shoes which he alleged belonged to him and were wrongfully detained by the latter, **or** AS AN ALTERNATIVE "for the sum of three thousand five hundred ten and $\frac{40}{100}$ dollars, the value thereof, in case a delivery cannot be had," and "for one thousand dollars damages and for costs of suit."

Hill admitted the seizure and detention of the goods specified, but declared that at the time of the taking and also at the date of suit he was United States marshal for the district of Colorado, and justified his action in the premises under two certain writs of attachment issued out of the circuit court of the United States for said district in the suits of Cousins *vs.* Witkowski and Bay State Shoe and Leather Co. *vs.* Witkowski, which suits were still pending in said court. He therefore denied the jurisdiction of the State court "to issue the writ of replevin in this suit" or "to entertain this suit against this defendant," and alleged that the transfer of title to the goods in question from Witkowski to Corcoran was collusive and fraudulent, and that at the time of their seizure they were the property of Witkowski.

Corcoran's replication admitted the official character of the defendant and the taking of the goods under the circumstances narrated; denied the charge of fraud and collusion, reiterated his claim to the goods, and justified the proceedings in the State tribunals by virtue of two orders issued by the circuit court of the United States and made of record in the cases against Witkowski prior to the bringing of the suit in the Denver superior court.

The orders referred to are in the following words:

"At this day comes John Corcoran, petitioner, by Charles Hartzell, Esq., his attorney, and the petition of said Corcoran for leave to bring suit against the marshal of this district coming on now to be heard, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said petition be granted.

"Wherefore it is ordered by the court that the said petitioner have leave to institute his suit upon claim and delivery of personal property against Zeph T. Hill, marshal of the United States for the district of Colorado, to replevin the goods and chattels in said petition described in any court of competent jurisdiction as he shall be advised." (R., pp. 13, 14.)

To this replication Hill demurred, because—

(1) The said orders gave leave to bring suit "against Zeph T. Hill, marshal," &c., while the suit was actually against him in his individual capacity;

(2) The State courts did not have jurisdiction to issue the writ of replevin in this suit, nor to entertain the suit at all, and it was beyond the power of the United States circuit court, "by any order or other proceedings, to confer jurisdiction upon this Court in the matter of this suit," and

(3) The facts stated did not constitute a good reply to defendant's plea.

The demurrer was overruled, and upon the trial in the said superior court verdict and judgment were in favor of Corcoran, as follows (Rec. upon *Certiorari*, p. 2):

"We, the jury, find that the said plaintiff is the owner of and entitled to the possession of the said goods and chattels in his said complaint and writ demanded, and that the value of said goods was on the day of the taking thereof the sum of three thousand five hundred and ten and seventy one-hundredths dollars ($3,510.70), and that the said plaintiff has sustained damages by occasion of the premises in the sum of ninety-three and sixty one-hundredths dollars.

"Therefore it is considered by the court here that said plaintiff do have and recover of and from said defendant the possession of the goods and chattels in said plaintiff's complaint and writ demanded, and that a writ issue therefor; *and it is further considered by the court that in case a return of said property cannot be had, then the said plaintiff to have and recover of and from the said defendant the said sum of three thousand five hundred and ten and seventy one-hundredths dollars, the value of said goods and chattels,* and also the further sum of ninety-three and sixty one-hundredths dollars, his damages aforesaid in form aforesaid assessed, and also his costs in this behalf laid out and expended, to be taxed, and have execution therefor. Thereupon it is considered by the court that the said jury be discharged from further consideration of the premises and go hence hereof without day."

Upon appeal to the supreme court of the State that judgment was affirmed.

ARGUMENT.

We contend that—

Upon the face of the record the present suit neither interferes with, nor threatens interference with, the possession of the marshal.

If, however, the Court should think otherwise, we rely upon the circumstance that—

The suit was brought by leave of that Federal court whose writ had authorized the marshal's possession.

The general question raised by the record is whether State courts should exercise jurisdiction of a *code proceeding* which concerns personal property in the custody of a United States marshal for the purpose of trying the question of title thereto and assessing damages for its wrongful detention.

On the trial it seems to have been assumed that by entertaining such a proceeding the State court had interfered or would of necessity interfere with the *possession* of the marshal, and because of this assumption the defense seems to have been mainly grounded on the invalidity of the "leave" granted by the Federal court under whose process (*attachment*) the marshal had taken and was holding possession.

Does the record disclose any interference with the possession of the marshal, or does it directly threaten any such interference hereafter? If it does not, any inquiry into the theoretical, *possible* effect of the "leave" would be superfluous.

In form the action is very similar to what at common law was styled *replevin* in the *detinet*. It is authorized under the designation of "claim and delivery" by the Colorado Code of Civil Procedure, the provisions of which material here are as follows:

After providing in the usual terms for "one civil action" (secs. 1 and 33) it created the usual "provisional and auxiliary remedies," amongst which are the following (*our italics*):

"SEC. 79. The plaintiff in an action to recover possession of personal property, may at the time of filing the complaint, or issuing the summons, or *at any time before judgment*, claim the delivery of such property to him as provided in this chapter."

"SEC. 80. Where a delivery is claimed, an affidavit shall be made by the plaintiff, or some one in his behalf, showing:" [that he is the owner of the property claimed, that the property is wrongfully detained by the defendant, etc.]

"SEC. 81. The plaintiff or his agent shall file with the clerk of the court a written undertaking, executed by two or more sufficient sureties, approved by the clerk, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action without delay and with effect, and for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff. *The clerk shall thereupon issue a writ requiring the sheriff to forthwith take the property described in the affidavit, if it be in possession of the defendant, or his agent, and retain it in his custody until delivered as hereinafter provided.* The sheriff shall also, without delay, serve on the defendant a copy of the writ by delivering to him personally if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual abode of the defendant, with some member of his family over the age of fifteen years; or if he has no place of abode, by putting such copy in the nearest post-office, directed to the defendant."

The other sections of the chapter provide for details not pertinent in this connection.

See General Statutes, 1883;—*additional* pp. 25, etc., following *regular p. 1428:* also *Rice's Code* (ed. 1890), pp. 191, &c.

Referring to code procedure, we may, *ex abundanti,* be allowed to submit a quotation from *Pomeroy's* well-known treatise upon "Remedies and Remedial Rights," section 111, as follows:

"The practice, since the codes, sometimes indulged in by courts in their solemn judgments, of retaining the ancient nomenclature, and of describing a given cause as 'trespass,' 'trover,' 'assumpsit,' and the like, is productive of confusion, and of confusion alone. No practical rules or doctrines in the administration of justice according to the reformed system of procedure result from these old forms; no practical aid in the decision of a cause is to be obtained from regarding it as 'trespass,' or 'trover,' or 'assumpsit,' or from giving it any other name. No difficulties are removed nor doubts cleared up by resort to this method of description. On the other hand, there is a constant tendency to associate with these names the rules and doctrines which were once inseparable from them, but which have been in the most positive manner abrogated by the legislature; in fact much doubt and confusion which even yet accompany the administration of justice in those States which have adopted the reform system of procedure is due to the retention of these names by the bench and the bar."

Accordingly it is submitted that in considering the question now here involved nothing is to be gained by calling the suit "replevin."

How far the action *as defined by the pleadings and judgment in the record* has violated well-established rules securing the possession of United States marshals against the effect of process issuing from courts of a State, is to be determined only by a scrutiny of the effect of the very procedure set forth in the record.

In this connection the case of Boley *vs.* Griswold (20

Wall., 486) is interesting. It was a case of *code replevin* from the Territory of Montana, whose code was substantially the same as that now in question (Laws of 1871, '72, pp. 28, 49, &c.). Verdict had been given for a return of the chattels, and, in case this could not be had, for the *value* thereof, &c. Thereupon the court entered a judgment for the *value only*. Upon appeal the form of the judgment was assigned as error, but this Court said:

"It is true that under the civil practice act of Montana there can be no judgment for the value if there can be a delivery of the property, but it is not true that the judgment is necessarily erroneous if the alternative is not expressed upon its face. The court must be satisfied that the delivery cannot be made before it can adjudge absolutely the payment of money; but if so satisfied, it may so adjudge. A special finding to that effect is not necessary. An absolute judgment for the money is equivalent to such a finding. * * * The presumption is, in the absence of anything in the record to the contrary, that before it was rendered the court had become judicially satisfied that the property could not be returned."

The judgment in the present case, being in the alternative form, is in consonance with the best practice, it being desirable to award such alternative judgment and await a return by the sheriff that possession cannot be had before confining the remedy to the second alternative.

From which it appears that the employment of such a code action as *might be, but in fact is not*, attended by the incident of *claim and delivery* does not necessarily threaten such an attempt upon possession as raises a Federal question.

In the light of the provisions of the Colorado code above referred to, it appears from the record that although the plaintiff *obtained leave* to resort to a proceeding having certain characteristics of replevin, yet that in fact he did not do so, but prosecuted a simple code action which might

have authorized such auxiliary proceeding, but which in fact ended in an *alternative* judgment, for either *the possession* of certain goods, OR, if that could not be had, *their value*. The plaintiff's affidavit, filed with the complaint (p. 5), is obviously defective as a prerequisite (sec. 80) to a "delivery," and as he did not file with the clerk *a written undertaking, with sureties in double the value,* etc., as required by section 81, it is manifest that he did not seek to entitle himself to issue a "*replevin*" writ requiring the sheriff to take possession of the property. Accordingly no such writ has been issued. And furthermore, inasmuch as "judgment" has now been taken in the principal action, it is plain by section 79 that he cannot "replevin" at all.

It is therefore submitted that the only apprehension of a collision between the process of the State court and the possession of the marshal must arise from some proceeding which may regularly follow the "judgment." But such proceeding (differing therein from the *absolute* exigency of the writ under *claim and delivery:* "sec. 81," above) must have an alternative execution, viz., for possession, **or** "in case a return of said property cannot be had," for its value. Admitting therefore the law as to the effect of the *leave* in question to be as claimed on behalf of the plaintiff in error, and assuming, besides, as is usual in such cases, that the State court will correctly administer the code action for the remainder of its proceeding, it cannot be doubted that upon the former alternative in the judgment the sheriff will return that *no goods are to be found* within his jurisdiction, and that thereupon execution will issue upon the second alternative.

Therefore it is true not only that no collision betwixt State and Federal authority has yet occurred, but that none is reasonably to be apprehended,—the present action amounting in effect to no more than one of *trespass* against the marshal, with the value of the goods as the measure of damages.

The case differs fundamentally from the leading case of Freeman *vs.* Howe, 24 How., 450, 453, where the "cars" in suit had been "taken out of the possession" of the marshal by the sheriff; and Taylor *vs.* Caryl, 20 How., 583, 592, where the "barque" had been "attached;" and Feusier *vs.* Lammon, 6 Nev., 209 (the general litigation in which appeared at another point in this Court, 111 U. S., 17), where the principal details being the same as here, the sheriff actually took the attached property from the custody of the marshal, under claim and delivery.

The reasoning in Buck *vs.* Colbath, 3 Wall., 334, and in the recent cases of Byers *vs.* McAuley, 149 U. S., 608; Moran *vs.* Sturges, 154 U. S., 256, Shields *vs.* Coleman, 157 U. S., 168, and Missouri Pacific R. Co. *vs.* Fitzgerald, 160 U. S., 556, sustains this contention.

The present case created no lien *by being filed*, as is the case with certain bills in equity; it does not require for its FRUITS a SEIZURE of the goods mentioned in the declaration. A suit for the *value* of unsold goods differs in principle from one for their proceeds after sale.

Should the sheriff hereafter, in disregard of the limits of his bailiwick (see Covell *vs.* Heyman, 111 U. S., 176–182), seek to take possession of the goods in question, instead of returning, under the suggestion of the judgment, that they "cannot be had," the question indicated by this writ of error may arise. Until then it is premature, there being no more reason to apprehend that upon consideration the Colorado sheriff will seize these goods than that he will pass the *geographical* bounds of the State and seize goods, say, within the State of Kansas.

The rule that of courts having concurrent jurisdiction, that court which first takes jurisdiction may maintain it to the end to the exclusion of all others is well settled, but the rule is expressly confined in its operation to the parties before the court or those who may, if they wish to do so, come before the court and have a hearing upon the issue to be

have authorized such auxiliary proceeding, but which in fact ended in an *alternative* judgment, for either *the possession* of certain goods, OR, if that could not be had, *their value*. The plaintiff's affidavit, filed with the complaint (p. 5), is obviously defective as a prerequisite (sec. 80) to a "delivery," and as he did not file with the clerk *a written undertaking, with sureties in double the value*, etc., as required by section 81, it is manifest that he did not seek to entitle himself to issue a "*replevin*" writ requiring the sheriff to take possession of the property. Accordingly no such writ has been issued. And furthermore, inasmuch as "judgment" has now been taken in the principal action, it is plain by section 79 that he cannot "replevin" at all.

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The reasoning in Buck *vs.* Colbath, 3 Wall., 334, and in the recent cases of Byers *vs.* McAuley, 149 U. S., 608; Moran *vs.* Sturges, 154 U. S., 256, Shields *vs.* Coleman, 157 U. S., 168, and Missouri Pacific R. Co. *vs.* Fitzgerald, 160 U. S., 556, sustains this contention.

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Should the sheriff hereafter, in disregard of the limits of his bailiwick (see Covell *vs.* Heyman, 111 U. S., 176–182), seek to take possession of the goods in question, instead of returning, under the suggestion of the judgment, that they "cannot be had," the question indicated by this writ of error may arise. Until then it is premature, there being no more reason to apprehend that upon consideration the Colorado sheriff will seize these goods than that he will pass the *geographical* bounds of the State and seize goods, say, within the State of Kansas.

The rule that of courts having concurrent jurisdiction, that court which first takes jurisdiction may maintain it to the end to the exclusion of all others is well settled, but the rule is expressly confined in its operation to the parties before the court or those who may, if they wish to do so, come before the court and have a hearing upon the issue to be

decided. It is limited in its application by the nature of the remedies and the character of the relief sought and the identity of the parties in the different suits. So it was ruled in *Buck vs. Colbath* (3 Wall., 334), which was a suit brought by Colbath in the proper State court against Buck for an alleged trespass in wrongfully taking away goods. There Buck pleaded as a defense that he was marshal of the United States for the district of Minnesota and had seized the property in question by virtue of a writ of attachment issued out of the circuit court of the United States in a suit therein pending, and it was held by this Court that the fact that the goods had been so seized did not deprive the State court of jurisdiction to try the title thereto in an action for trespass against the marshal.

A sharp distinction is drawn between that case and the case of *Freeman vs. Howe* (24 How., 450), wherein it was sought to deprive the circuit court of the United States, *against its will*, of possession of goods held under cover of its process by a writ of replevin issued out of a State court. That this cannot be done is settled; but as to all other remedies to which a person whose goods have been wrongfully seized under color of process may be entitled, either against officers or parties, "he may pursue them in any tribunal, State or Federal, having jurisdiction over the parties and the subject-matter."

Covell *vs.* Heyman, 111 U. S., 176.
Byers *vs.* McAuley, 149 U. S., 614.

There is "nothing, therefore, in the mere fact that the writ issued from the Federal court to prevent the marshal from being sued in the State court, in trespass for his own tort in levying it upon the property of a man against whom the writ did not run and on property which was not liable to it."

The plea of personal exemption from suit in a State tribunal set up by the plaintiff in error is therefore not well grounded, for—

"Where it is not sought *forcibly* to invade the Federal jurisdiction, neither the writ under which he acted nor his official character will afford the marshal any defense."

Bock *vs.* Perkins, 139 U. S., 628.

It is true that in such actions against a Federal marshal he may, by complying with certain statutory provisions, remove the suit into the Federal courts for determination. But in the absence of any attempt so to remove, it would seem to be futile to attempt to contest the jurisdiction of the State court on the ground of official action or character.

The above view of what are supposed to be the essential features of this case may be ended by submitting that if *the orders* given in the United States court were erroneous, as contemplating a taking from the marshal of goods which the latter had regularly attached in a suit pending in that court, that error might have been corrected either *there* or upon appeal. It is said that Corcoran's application for leave was *ex parte*. That application and also the leave were by themselves merely *frustra*. But as soon as the marshal was notified of their effect, by an attempt to seize, either he or the plaintiff in the attachment could in turn have applied to the United States court and been protected—at all events upon appeal.

But no attempt to seize the goods has been shown nor is any threatened. The case is not therefore obnoxious to the principles of Freeman *vs.* Howe and Covell *vs.* Heyman.

But let us suppose for argument's sake that the matter of the validity of the *leave* was important here. What then?

The right of the possessing court to maintain exclusive jurisdiction in cases of the class first above cited is founded upon principles of "comity and necessity," but the question involved is not whether jurisdiction *exists* in the opposing tribunal. It concerns the propriety of its exercise. Unless it be established that the opposing tribunals possess con-

currence of jurisdiction over the cause of action or subject-matter, as the case may be, the necessity for the rule announced in Freeman *vs.* Howe could not arise. Hence the real inquiry is not whether the State court has jurisdiction in the premises, but ought it to exercise it?

If the court in possession of the *res* should insist upon the right to determine for itself all matters pertaining thereto, the answer to the above question must undoubtedly be in the negative. But may not such court, for "good and sufficient reason to it appearing," relinquish its right to the maintenance of exclusive jurisdiction in the premises and consent to the institution in another tribunal of collateral proceedings to determine the title to the *res?* No law forbids such consent. "Comity" or "necessity" certainly do not. When once the Federal tribunal has consented the reason for the decisions above referred to falls.

Cessante ratione legis cessit ipsa lex. Co. Lit., 70.

The whole problem considered in the above-noted cases is the avoidance of conflict in the exercise of powers between two courts acting under authority conferred by different sovereignties, but exercised within the same general territorial limits. When this problem is solved by the amicable action of the respective courts themselves no good reason appears why either may not proceed to a finality with such matters as may properly be within the scope of its jurisdiction.

In the absence of objection on the part of the parties to the original suit the granting of such consent by the Federal tribunal would seem to be unimpeachable, and certainly it would not lie in the mouth of the marshal, a mere ministerial officer, whose sole authority in the premises is derived from the process of the court, to object to any disposition of the cause which to the court may seem proper.

It is true that by the levy the marshal acquires a *special*

property in the chattels seized, but this is merely sufficient to enable him to maintain possession thereof *until the further* order of the court. It certainly gives him no such interest in the *res* as entitles him to dictate the method to be pursued in determining the question of title thereto.

That this is true must follow from the well-settled principle that there is inherent in every court the "power to supervise the conduct of its officers and the execution of its judgments and process. Without this power courts would be wholly impotent and useless."

Griffin *vs.* Thompson, 2 How., 244, 257.
Eton *vs.* C., St. L. & K. C. R'y Co., 41 Fed. Rep., 421.

And this power extends even to the granting of a perpetual stay.

Monroe *vs.* Upton, 50 N. Y., 593.
Keeler *vs.* King, 1 Barb., 390.
Parks *vs.* Goodwin, 1 Mich., 35.
Hamson *vs.* Sales, 6 Pa. St., 393.

If the court having possession of the *res* may stay or quash the process under which it was seized and is held, for the purpose of preventing wrong or oppression, why may it not do less in the same line? The power to quash would include the power to stay for purposes of investigation, &c. In the exercise of its discretion in quashing a writ of attachment the court is surely not subject to the control or objection of its marshal.

As well might a receiver in a Federal court object to an order of the court permitting him to be sued in a State tribunal.

"It is for the court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals or may leave him to adjust and settle them without suit, as in its judgment may be most

beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver or may reserve to itself the determination thereof."

Porter *vs.* Sabin, 149 U. S., 473–479.

Is not this rule applicable to the point here in controversy? It would seem to apply as well to one officer of the court as to the other, and the only person who might, perhaps, be permitted to object to its application would seem to be the plaintiff in the attachment proceedings, who in the case at bar by silence must be deemed to have assented to the proceeding in the State tribunal.

It is for the court having possession of the *res* to determine in its wise discretion whether it will maintain its right to deal therewith exclusively, or whether it will waive such right either temporarily or finally in favor of some other competent tribunal. This right to insist upon the maintenance of exclusive jurisdiction belongs to the court alone. It is not a right in anywise pertaining to the marshal or his duties, nor is it a matter in which he has any personal interest. He is not, therefore, in such a situation as entitles him to raise a Federal question by objecting to the proceedings in the State court.

Giles *vs.* Little, 134 U. S., 645.

Ludeling *vs.* Chaffe, 143 U. S., 301.

The "*leave*" complained of did not in intention or effect invest the State court with any jurisdiction which that court did not already possess. At best the orders are but evidence of the assent of the Federal tribunal to the *exercise* of such jurisdiction. The "comity and necessity" of maintaining exclusive jurisdiction is the "comity and necessity" of independent sovereignties operating within identical territorial limits. If the respective sovereignties, acting through their judicial officers, who must be charged with the due administration of the "comity" and the judging of

the "necessity," see fit in a particular case to waive the right of exclusive jurisdiction, who shall gainsay it?

If such a waiver by a Federal court removes the bar raised by "comity" against the exercising of jurisdiction already reposing in the State court, the determination of the merits by the latter is not matter for review here.

Hill's claim that the goods seized were the goods of Witkowski and not the goods of Corcoran involved a matter of fact which was determined adversely. The authority conferred upon him under the laws of the United States was not denied. The validity of the writ under which he acted was not questioned. The sole authority of which he could properly claim to be possessed was authority to attach the goods of Witkowski. He had no authority to attach the goods of Corcoran, and it does not appear from the record that he claimed to possess any such authority. But even if it be thought that his plea sets up a *claim of authority to seize the goods of one* not named in the writ, such claim would not under the circumstances of this case serve to raise a Federal question entitling him to be heard here.

To subject the judgment of a State court to examination here there must be *something more than the bare assertion of the existence of an authority* exercised under the United States. As was said by this Court in Millingar *vs.* Hartupee (6 Wall., 258)—

"The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against *claims of authority* under the United States.

"In respect to the question we are now considering 'authority' stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and looking into the record it should appear that no such treaty or statute existed or was in force, it would hardly be insisted that this Court could review the decision of a State court that the right claimed did not exist."

The concurring judgments of the State courts turned upon the verdict of the jury establishing the title to the goods in controversy to be in Corcoran. This was a finding of fact upon the submission of the whole case before a competent tribunal. It involved no question of Federal law, and, therefore, is not reviewable here.

Merced Mining Co. *vs.* Boggs, 3 Wall., 304.
Crary *vs.* Lewis, 3 Wall., 106.
Choteau *vs.* Marquette, 12 Pet., 507.
St. Paul, Minn. & M. R'y Co. *vs.* Todd Co., 142 U. S., 282.

Although the pleadings prior to the filing of the replication may have apparently presented a Federal question, such question disappeared upon the showing made by the replication, and the demurrer thereto was properly overruled. The writ of error should be dismissed.

With this general reply to the several assignments of error in the brief of the learned counsel for the plaintiff, nothing more occurs to say except that the question raised under the 3d paragraph of *assignment III* (p. 9, Brief of P. E.) might perhaps have been better tested by applying to the court which granted the leave, and that, moreover, it is not *Federal*. The court which granted and that which received the leave seem not to have differed in its construction; besides, leave to sue *A. B. Marshal* and leave to sue him *as Marshal* may well differ in meaning, the word "Marshal" in the former connection being merely *descriptio personæ*.

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